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Supreme Court, U.S.

FILED

MAR 21 1988

JOSEPH F. SPANIOL, JR.
CLERK

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

MELVIN D. PHILLIPS,

Petitioner,

vs.

CITY OF MARTINEZ, et al.,

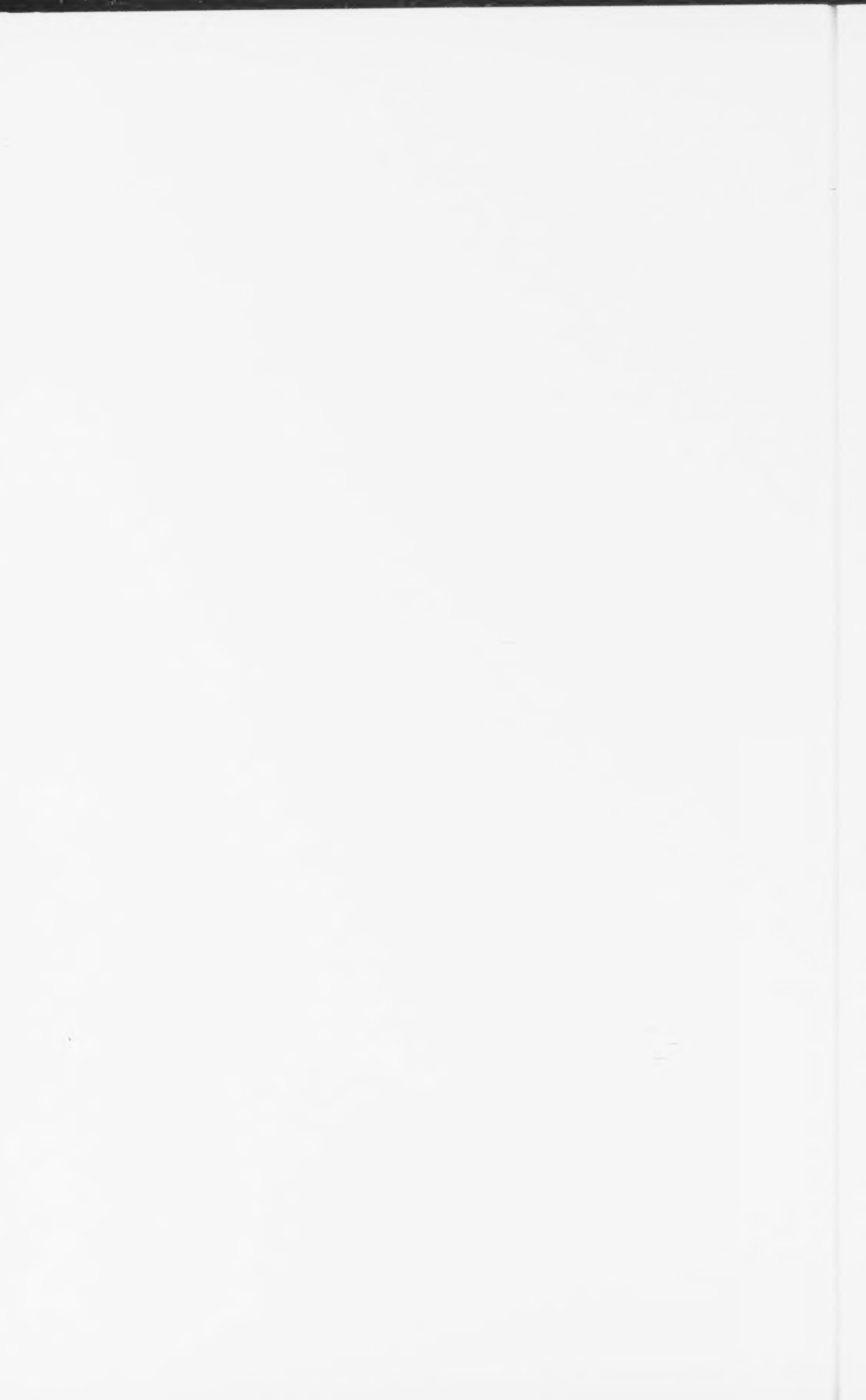
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
(Division Five)

PETITION FOR WRIT OF CERTIORARI

Melvin D. Phillips
In Propria Persona
P.O. Box 1979
Martinez, CA 94553
(415) 372-3394

1517



QUESTIONS FOR REVIEW

The questions presented for review by this court, on the facts stated herein, are as follows:

1. Can the City of Martinez deprive Petitioner all uses of 120 acres of Petitioner's real property without compensating Petitioner?

2. Does the scenic easement, demanded by the City of Martinez, constitute a taking of Petitioner's commercial timber?

3. Has the City of Martinez violated Petitioner's constitutional right to due process by refusing to abide by existing municipal ordinances?

4. Has the State violated Petitioner's constitutional right to due process by ignoring existing State laws in rendering judgment for the Respondent?



5. Does the State law regarding writs of Mandate violate constitutional guarantees against a taking of property without compensation and the rights of due process?

PARTIES

Petitioner: Melvin D. Phillips
(In Propria Persona)
P.O. Box 1979
Martinez, CA 94553
(415) 372-3394

Respondent: City of Martinez, Peter Langley,
Gary Hernandez, Bill Pollacek,
Kathy Radke, Richard Loewke

Represented by: Jeffrey A. Walter
Waterfall Towers
2455 Bennett Valley Road,
Suite 302B
Santa Rosa, CA 95404
(707) 523-0732

Superior Court: Judge David A. Dolgin
Case No. 273 655
Court Clerk, J.R. Olsson
725 Court Street
P.O. Box 911
Martinez, CA 94553
(415) 646-2950

Appellate Court: Justices H.W. Low,
D.B. King, Z.P. Maning
Case Number A036295
Court Clerk, Ron D. Barrow
350 McAllister Street
4th Floor
San Francisco, CA 94102
(415) 557-1896

Supreme Court: Chief Justice, Malcolm Lucas
Case Number S002953
Court Clerk, Lawrence P. Gill
350 McAllister Street
4th Floor
San Francisco, CA 94102
(415) 557-0587

California Attorney General:
John K. Vandekamp
350 McAllister Street
Room 6000
San Francisco, CA 94102
(415) 557-2544

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MELVIN D. PHILLIPS,

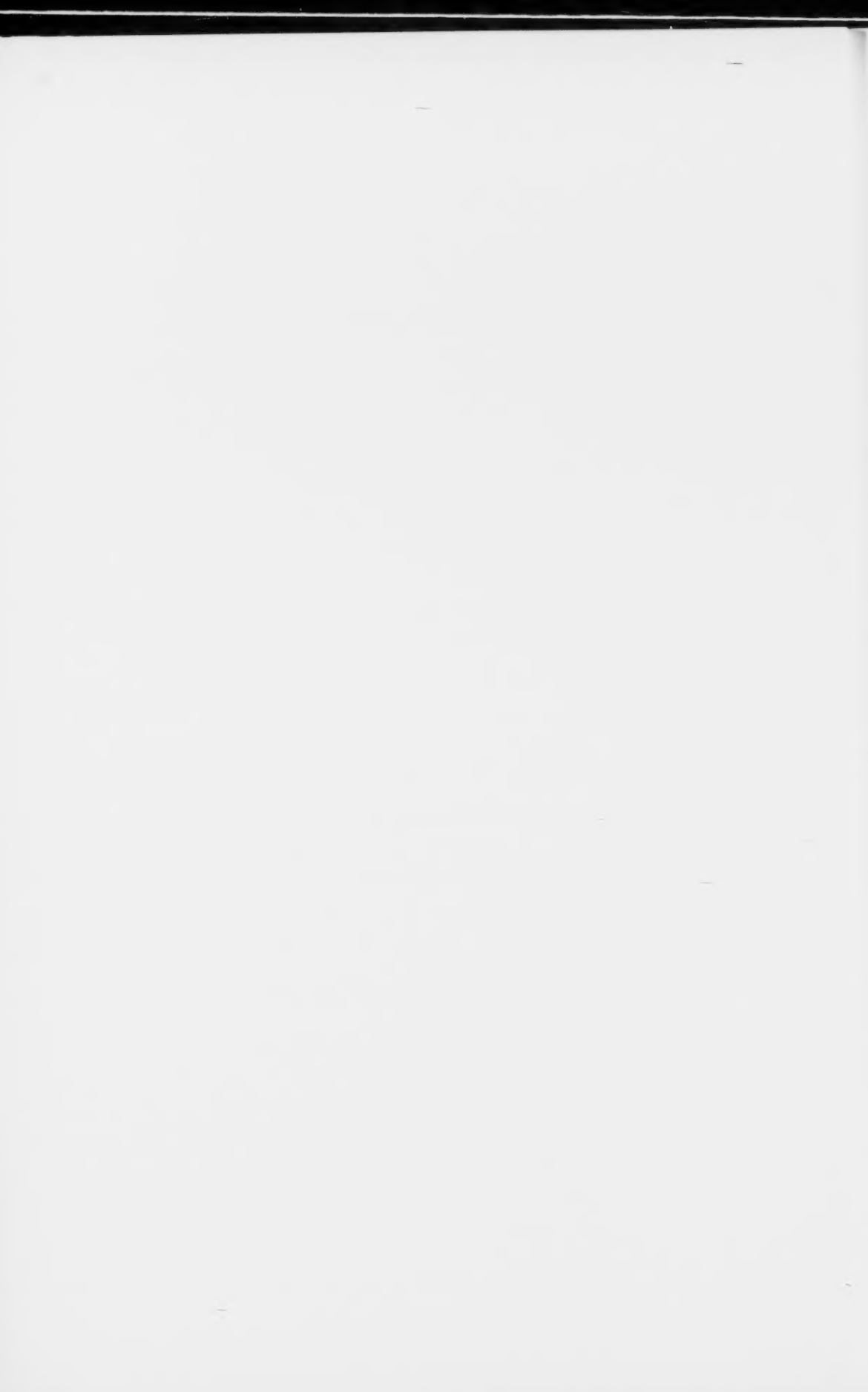
Petitioner,

vs.

CITY OF MARTINEZ, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
(Division Five)



JURISDICTION

The Judgment to be reviewed was signed and filed on June 4, 1986. The Judgment was entered on July 8, 1986. The Appellate Court issued it's report on October 20, 1987. The State Supreme Court denied the petition for review on December 22, 1987. The Appellate Court's decision became final on January 26, 1988.

This court has jurisdiction of this case, pursuant to Rule 17 and section 1257 of Title 28 of the United States Code.

The California State Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this court.

In addition, a State statute is being drawn into question as being repugnant to the U.S. Constitution.

PERTINENT LAW

Writ, when and upon what to issue.

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

California Code of Civil Procedure §1086.

Inquiry into validity of administrative order or decision.

The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

California Code of Civil Procedure §1094.5.

(b)

Conditions for issuance of variance, building, or use permits.

No local governmental body, or any agency thereof, may condition the issuance of any building or use permit or zone variance on any or all of the following: (a) The dedication of land for any purpose not reasonably related to the use of the property for which the variance, building, or use permit is requested.

California Government Code §65909.

...nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. Sec. 1

6. Eminent Domain (Headnote)

Where there was sizable amount of merchantable timber on property on which "scenic easements" were imposed, and ban was imposed on tree cutting, timber was to be deemed taken in its entirety. Wild and Scenic Rivers Act, § 1(b) et seq., 16 U.S.C.A. §1271 et seq.

UNITED STATES v. COUGHLIN (1975)
405 F. Supp. 13

STATEMENT OF THE CASE

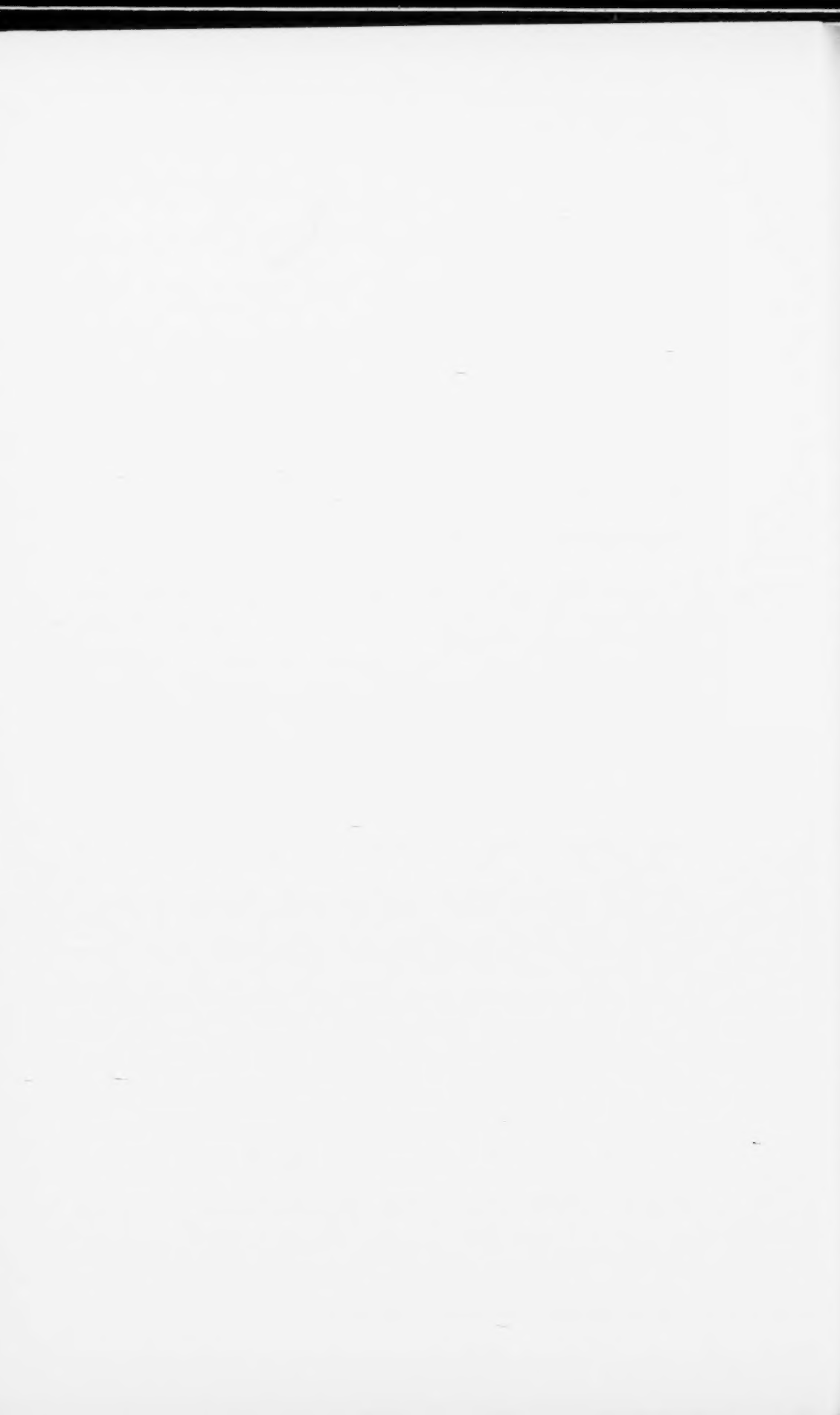
This case stems from an application by Petitioner for a building permit from the City of Martinez, the Respondent. Petitioner's property was 160+ acres of land, with a zoning of R-7.5 (one single family home for each 7500 square feet of land). The Martinez City Council



approved Petitioner's application with three City conditions. The conditions were that: (1) Petitioner must install a permanent soils retention basin to reduce soil erosion discharge into City storm drains; (2) Petitioner must modify the proposed grading plan to retain eight small oak trees; and (3) Petitioner must grant the City a scenic easement on 120 acres of Petitioner's property, with the terms to be specified at a later date.

Petitioner was given a grading permit. Petitioner graded the building pad, driveway and completed approximately seventy-five percent of the permanent soils retention basin. At that point, Petitioner had spent \$4,000.00 for underground utilities and \$19,000.00 in grading costs.

Petitioner submitted building plans to the Martinez Building Department. Petitioner made modifications in the



plans as requested by the Building Department and was ready to have the building permit issued. Richard Loewke, the City Planning Director, would not allow the building permit to be issued until the scenic easement was signed. Mr. Loewke said that his staff had not had time to draft the document.

In order to prevent unnecessary delay in the construction, Mr. Loewke granted approval for the excavation of Petitioner's foundation. After Petitioner's foundation excavation was completed and the reinforcing steel was in place, Petitioner asked for inspection and approval for concrete implacement. Mr. Loewke presented the scenic easement to Petitioner. Petitioner objected to the document, stating that the document restricted all uses of Petitioner's property.

Mr. Loewke stated that if Petitioner did not sign the document, the building



permit for Petitioner's home would not be issued. Petitioner informed Mr. Loewke that if Petitioner were forced to sign the document, Petitioner would sign the document under protest and sue Mr. Loewke and the City. Petitioner signed the scenic easement. The building permit for Petitioner's house was issued. Petitioner filed a claim against the City for damages. Petitioner then filed suit in Contra Costa County Superior Court.

The City demurred to Petitioner's complaint. The Superior Court sustained Respondent's demurrer on the grounds that Petitioner's only remedy was to file a writ of mandate against Respondent.

Petitioner appealed the Superior Court's decision. The Appellate Court, in an unpublished opinion, concurred with the Superior Court. Petitioner appealed the Appellate Court's decision to the



California State Supreme Court. The State Supreme Court concurred with the Appellate Court by refusing to consider the appeal.

Petitioner raised the Federal question, in the first instance, regarding the taking of property without compensation in the first cause of action of the complaint (Appendix). The issue of due process was raised in the eighth cause of action of the complaint. The Judges' decision did not address the Federal question issues.

Petitioner reiterated the Federal questions in his opening brief to the Appellate Court (section "E" page 11). The Appellate Court did not address the Federal question issues.

ARGUMENT

In order to properly access this case, one must be able to make some clear distinctions. One distinction that must

be made is between discretionary acts, arbitrary acts, and illegal acts of municipalities.

Discretionary acts consist of the existing ordinances, laws and regulations that a government official may chose to apply in a specific situation. An arbitrary act is an act that is not found in ordinances, laws or regulations, but is made up in the present, for a particular situation or for a particular person. An illegal act is an act that is prohibited by ordinances, laws and regulations.

The complaint alleged that the acts of the Respondent were arbitrary or illegal. California Government Code §65909 specifically states that the Respondent was prohibited from conditioning the dedication of land for the issuance of a building permit.

The California Writ process states that it is limited to the review of

jurisdiction, a fair trial and abuse of discretion. In practice the California Courts have determined that arbitrary and illegal acts are afforded the same protection as discretionary acts of municipalities. Such an expanded interpretation completely destroys the concept of due process.

For due process to have any meaning, the Respondent must be required to follow their ordinances. If those ordinances state that Petitioner was entitled to a building permit, the permit should have been issued without attempts at extortion.

Likewise, the Appellate Court should have followed State law (Gov. Code §65909) and declared that this scenic easement was invalid, therefore null and void.

Had Petitioner sued Respondent for the cost of installing the soil retention basin or for the cost of the grading

changes, the courts would be directly on point. With the scenic easement, however, the twofold reasons as explained by the Appellate Court (Appellate Report, page 3) are not applicable. First, there was no cost of the condition. Second, there was no unpredictable liability. The liability of Respondent was created by the taking of Petitioner's property without compensation. The Petitioner already had a right to the building permit, therefore the scenic easement could not be a condition of approval as Petitioner did not, in fact, accept anything from Respondent (i.e. land use permit, rezoning, etc.).

The question should be, has property been taken? If yes, has compensation been paid? If not, the taking is unconstitutional.

The result, therefore, should be that a state law (i.e. Writ of Mandate) cannot

excuse the duty to compensate for the taking of property.

A side issue in this case is the timber on the land. Federal decisions state that the scenic easement is a complete taking of the timber. On this issue alone, a cause of action has been stated against the Respondent.

Submitted by: Melvin D. Phillips
Melvin D. Phillips

APPENDIX

Superior Court Memorandum of Decision

Superior Court Judgment

Appellate Court Unpublished Report

State Supreme Court Denied Review

Appellate Court Remittitur

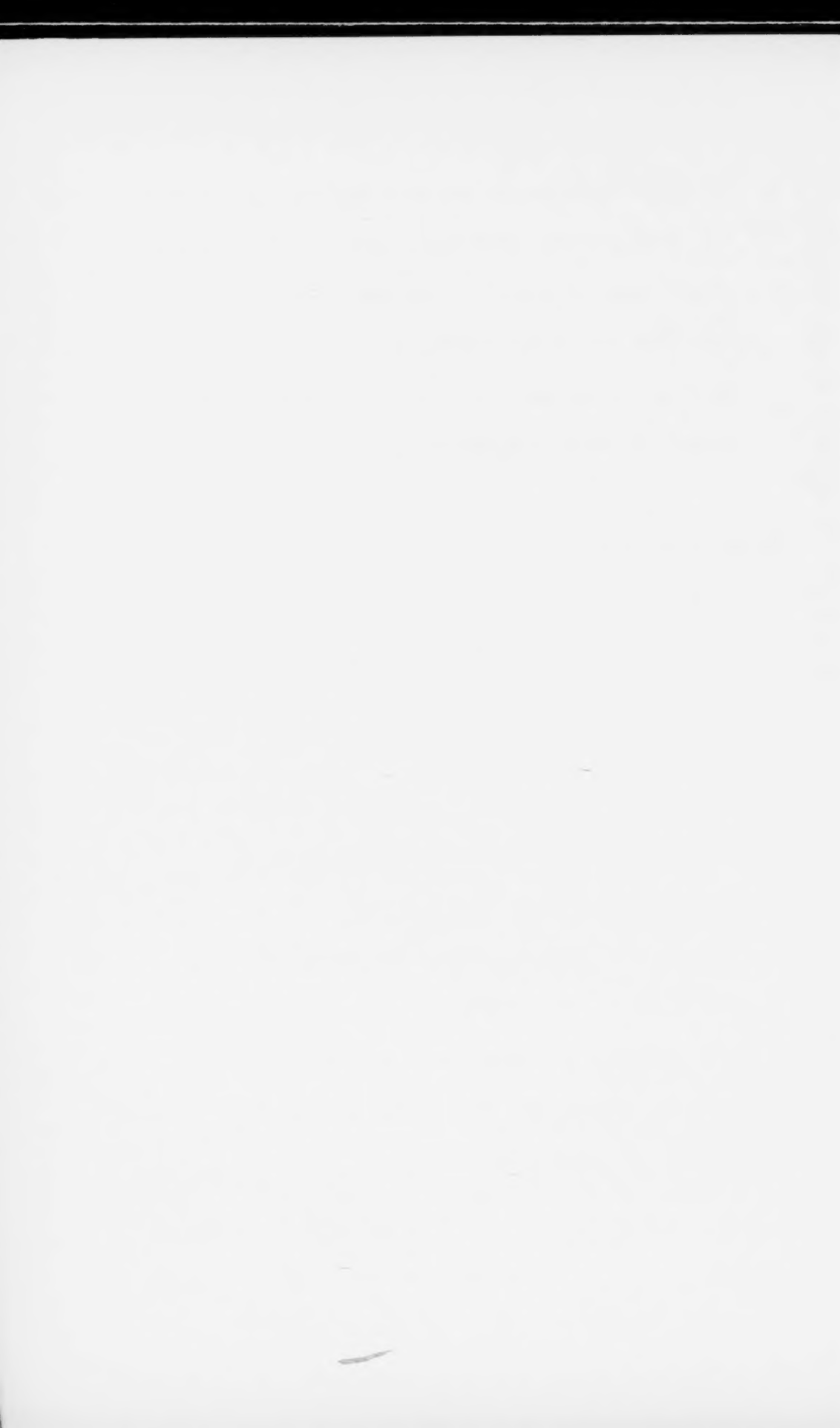
Appellate Court Entry of Remittitur

Petitioner's Complaint

Petitioner's Appellate Brief

Letter to State Attorney General

Proof of service



IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF
CONTRA COSTA. Case No. 273655,
MEMORANDUM OF DECISION (FILED MARCH 24,
1986)

MELVIN D. PHILLIPS, Plaintiff, vs. CITY
OF MARTINEZ, a municipal corporation;
PETER LANGLEY, Vice Mayor; GARY
HERNANDEZ, City Council Member; BILL
POLLACEK, City Council Member; KATHY
RADKE, City Council Member; RICHARD
LOEWKE, City Planning Director; and DOES
I through 10, inclusive, Defendants.
Demurrer is sustained without leave to
amend.

1. First-Fifth Causes of Action are
apparently actions for damages under the
theory of inverse condemnation. Such
causes of action are inappropriate for
the alleged unlawful imposition of a
condition to a building permit. The
appropriate action is a Writ of Mandate
which must be filed within 90 days of
the governmental action. So, even if



the action were to be converted to a Petition for Writ of Mandate, it would be time-barred.

2. Demurrer to the Sixth Cause of Action is sustained without leave to amend. A city and its employees are immune from tort actions for discretionary acts in their governmental capacity. Punitive damages are not recoverable against a government entity.

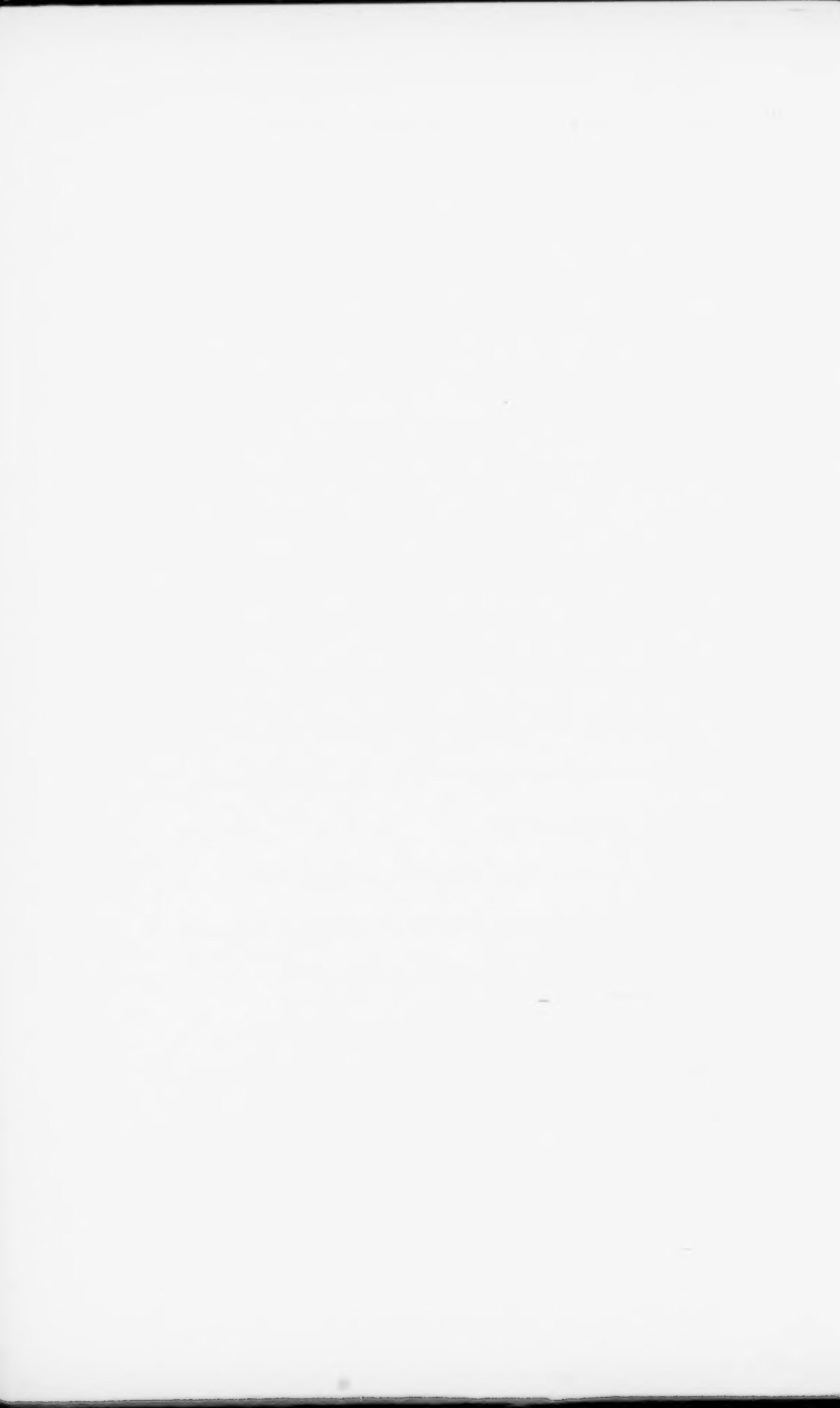
3. Demurrer to the Seventh Cause of Action is sustained without leave to amend since a city employee acting in his discretionary capacity is immune from tort liability.

4. Demurrer to the Eighth Cause of Action is sustained without leave to amend since it is a rehash of the First-Fifth causes of Action, asking only for different relief.

DATED: MAR 24 1986

DAVID A. DOLGIN (signed David A. Dolgin)

JUDGE OF THE SUPERIOR COURT



JEFFREY A. WALTER
WALTER, PISTOLE & SPOHN
827 Third Street
Santa Rosa, CA 95404
(707) 523-0732

Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF CONTRA COSTA. Case
No. 273655, JUDGMENT (FILED JUN 4,
1986)

MELVIN D. PHILLIPS, Plaintiff, vs. CITY
OF MARTINEZ, et al., Defendants.

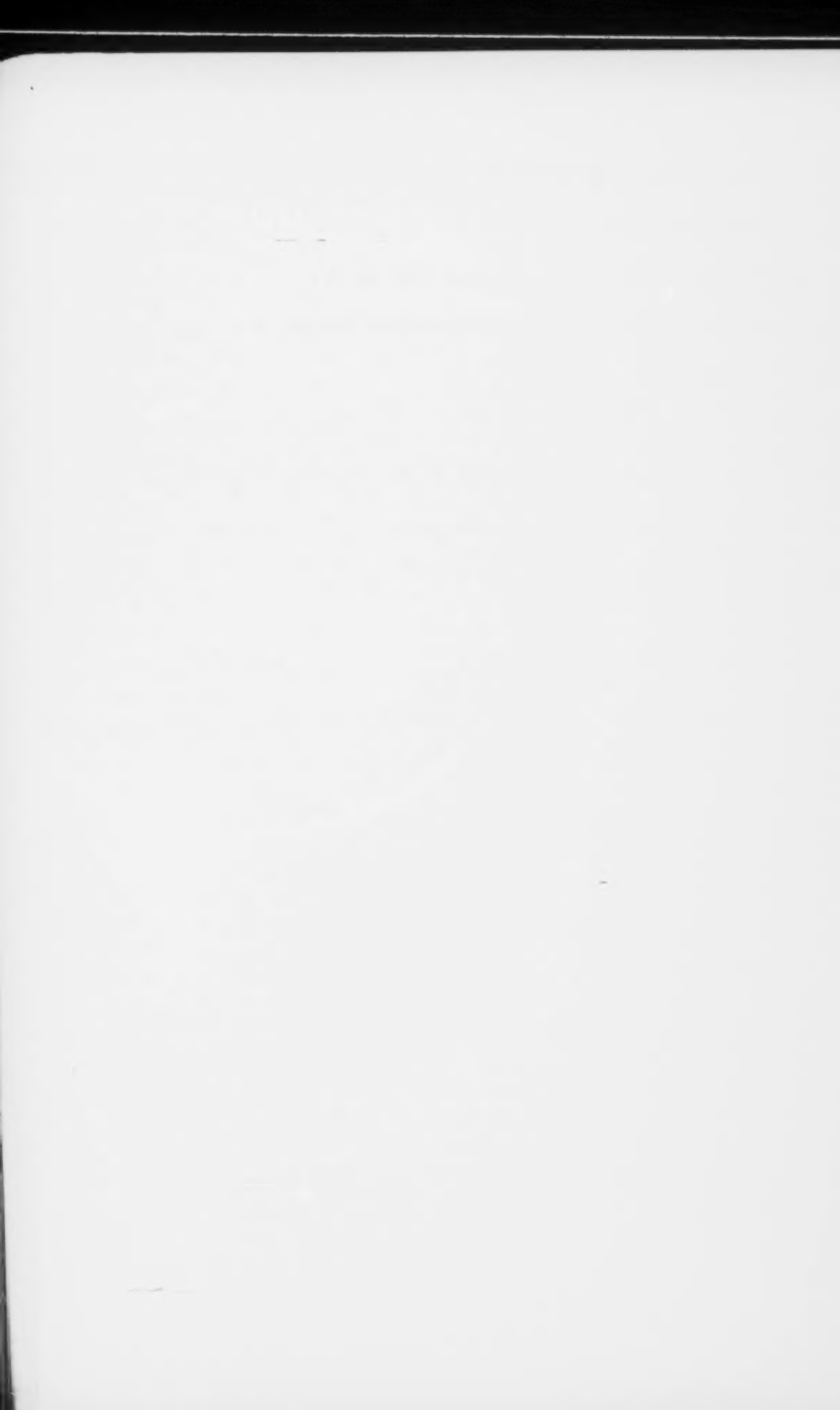
Defendants' demurrer to the First
Amended Complaint having been granted by
this court without leave to amend,
IT IS ADJUDGED, ORDERED AND DECREED that
plaintiff, Melvin D. Phillips, take
nothing by reason of his First Amended
Complaint filed herein and that the
defendants, City of Martinez, Peter
Langley, Gary Hernandez, Bill Pollacek,
Kathy Radke and Richard Loewke, recover
from plaintiff costs and disbursements

in an amount proved by memorandum.

Dated: June 4, 1986

DAVID A. DOLGIN (signed David A.

Dolgin) Judge of the Superior Court



IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA FIRST APPELLATE DISTRICT
DIVISION FIVE. Case No. AO36295 Contra
Costa Co. Sup.Ct.No. 273655 (FILED OCT
21 1987)

MELVIN D. PHILLIPS, Plaintiff and
Appellant, v. CITY OF MARTINEZ et al.,
Defendants and Respondents.

Plaintiff Melvin D. Phillips sued for
damages and declaratory relief against
the City of Martinez (City), several
city council members and the planning
director, claiming that the City imposed
an invalid condition on his residential
building permit. The trial court
sustained a general demurrer to the
first amended complaint without leave to
amend, entered judgment for the
defendants, and denied Phillips's motion
for reconsideration. We construe the
appeal as being from the judgment, and
we affirm.

Phillips, owner of the 163-acre property
in the City, applied for a building



permit to construct a residence on his property. On July 18, 1984, the city council approved Phillips's application, as recommended by the City's planning director. Approval was conditioned on Phillips conveying to the City an easement requiring that he maintain a 120-acre portion of his property in open space, as well as providing an emergency vehicular access easement over a three-quarter-acre portion of the property. Phillips complied with the conditions "under protest," and conveyed the open space easement on July 27, 1984.

On June 28, 1985, Phillips sued defendants alleging eight causes of action, seeking damages, declaratory relief and cancellation of the open space easement. The trial court held (1) that causes of action one through five and eight, which challenge the lawfulness of the permit conditions, could only be brought by writ of mandate, and only within 90 days of the

government action, and (2) that the sixth and seventh causes of action were barred by the immunity of a city and its employees from tort liability for discretionary actions.

Plaintiff did not file an appeal from the judgment, but instead appealed the denial of his motion for reconsideration of the order sustaining the demurrer. Such an order is not appealable.

However, because the judgment had already been entered at the time plaintiff filed his notice of appeal, and because plaintiff shows an intention to appeal from the judgment, we construe the appeal as being from the judgment.

(Shonkoff v. Dant Inv. Co. (1968) 258 Cal.App.2d 101.) On appeal from a judgment rendered following the sustaining of a general demurrer, we must consider as true all properly pleaded factual allegations of the complaint, and determine whether those facts would entitle the plaintiff to relief under the legal theory.



First Through Fifth Causes of Action
(Inverse Condemnation)

A landowner who accepts a land use permit and complies with its conditions may not at a later time sue the issuing agency in inverse condemnation for the cost of compliance. (County of Imperial v.

McDougal (1977) 19 Cal.3d 505, 510-511, app. dism. 434 U.S. 944.) Rather, the landowner's proper remedy is to seek invalidation of the condition by a writ of administrative mandate at the time it is imposed. (Code Civ. Proc., § 1094.5)

The reasoning behind this rule is twofold. First, it would be unfair for the landowner to accept the benefits of the permit while recovering from the government the costs of the condition.

(Ibid.) Second, the rule is required so that the validity of agency actions can be promptly determined and unpredictable public liabilities avoided. (Air Quality Products, Inc. v. State of California (1979) 96 Cal.App.3d 340, 352.)



Plaintiff accepted the building permit and constructed his house. He complied with the conditions imposed and did not bring a legal challenge until nearly one year later. He has thus lost the right to assert the invalidity of the conditions.

This case does not involve the exceptional circumstances encountered in McLain Western #1 v. County of San Diego (1983) 146 Cal.App.3d 772, 777 (multiphase project interrupted by passage of ordinance requiring exactions), or Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal.App.3d 914, 941-942, modified 173 Cal.App.3d 852a (permit approval conditioned on execution of an unlawful agreement of unclear scope and effect). While Phillips may have suffered financial detriment had he delayed construction in order to challenge the conditions, to make an exception in every such case would virtually destroy



the rule. (See Pfeiffer v. City of La Mesa (1977) 69 Cal.App.3d 74, 78.)^{1/} Plaintiff's reliance on First Lutheran Church v. Los Angeles County (1987) 482 U.S. ____ [96 L.Ed.2d 250], is misplaced. In First Lutheran Church, the court held that a plaintiff who successfully challenges a regulation on the ground that it effected a taking of her property is entitled to compensation for the period that the regulation was in effect and cannot constitutionally be

^{1/} Legislation effective January 1, 1985, provides a remedy for the landowner who wishes to challenge an exaction while complying in the interim and continuing his or her project. (Gov. Code, § 65913.5.) The statute allows a party to comply under protest and to preserve his or her remedies, but establishes a 180-day limitation period. (Gov. Code, § 65913.5, subd. (d).) We assume without deciding that Government Code section 65913.5 does not retroactively apply to this action, as the events from which the action stems took place prior to the effective date of the statute. The result we reach would be no different if section 65913.5 did apply, as Phillips's challenge to the validity of the conditions would be barred by the 180-day limitation provision.

restricted to declaratory or mandamus relief. (At p. ____ [96 L.Ed.2d at p. 268] [overturning contrary rule in Aqins v. City of Tiburon (1979) 24 Cal.3d 266, affd. on other grounds (1980) 447 U.S. 255].) First Lutheran Church does not speak to the present case, in which plaintiff's remedies were lost through his own compliance with the allegedly invalid conditions.

Plaintiff's inverse condemnation claim is also barred by Government Code section 65907, which establishes a 90-day limitation period for challenges to permit conditions imposed pursuant to review authority granted by a zoning ordinance. (See Gov. Code, § 65901.)

We take judicial notice of Martinez Municipal Code sections 22.34.030-22.34.070, providing for design review of residential building permits in highly sloped and visually significant areas. (Evid. Code, §§ 452, 459.)

Plaintiff appears to admit that his

permit was subject to design review, complaining not of a lack of jurisdiction on the part of the planning director but of an abuse of discretion in the review process itself. The imposition of a condition on Phillips's permit thus was a matter coming within the scope of Government Code sections 65901 and 65903; hence it is subject to the limitation period of Government Code section 65907.

Because the plaintiff's inverse condemnation claims are barred both by his compliance with the permit conditions and by Government Code section 65907, he could not have cured the defects through amendment of his complaint. The trial court thus properly sustained the demurrer to the first through fifth causes of action without leave to amend.

Even if plaintiff somehow overcame these procedural obstacles, the demurrer would still have been properly sustained

the merits. In order to state a claim for an unconstitutional regulatory taking of his property, Phillips would have had to allege facts sufficient to show (1) that the permit conditions denied him economically viable use of his land (Agins v. City of Tiburon, supra, 447 U.S. at p. 260) or completely eliminated an important property right (Nollan v. California Coastal Comm'n (1987) 483 U.S. ___, ___ - ___ [97 L.Ed. 2d 677, 685-686]), and (2) that the permit conditions did not substantially serve a public purpose connected to the effects of the proposed development. The complaint fails to allege such facts. Indeed, it shows that in addition to the residence Phillips was permitted to build, 43 of his 163 acres remain unencumbered by the easements and are zoned to allow residential development. The land subject to the open space easement is admitted to retain a value of at least \$400 per

acre. While the complaint alleges the use of "irrelevant" ordinances in the permit review, no facts are alleged to support this conclusion. Elsewhere, the plaintiff admits that the easements were imposed for public ecological benefit and to decrease automobile traffic and emissions in the area. These facts do not state a claim in regulatory inverse condemnation.

Eight Cause of Action
(Declaratory Relief)

Plaintiff challenges the validity of the City's design review ordinance as applied to his permit. The appropriate method of review in such a case is by writ of administrative mandate rather than an action for declaratory judgment.

(State of California v. Superior Court
(Veta Company) (1974) 12 Cal.3d 237,
251.) Amendment would not save the complaint, as this cause of action which rests on the same facts as the first five would still be barred (1) by plaintiff's acceptance of the permit and

compliance with its terms (see County of Imperial v. McDougal, supra, 19 Cal.3d at pp. 510-511) and (2) by Government Code section 65907.

Sixth and Seventh Causes of Action
(Intentional Tort)

Plaintiff alleges that the imposition of the permit condition was a tortious misuse of the defendant's permit authority. Neither public entities nor their employees are liable in tort for the discretionary denial or conditioning of a permit. (Gov. Code, § 818.4; see legis. committee com., Deering's Ann. Gov. Code, § 818.4 (1982 ed.) pp. 167-168; § 821.2) The demurrer to these causes of action was properly sustained without leave to amend.

Affirmed.



LOW, P.J.

We concur:

KING, J.

HANING, J.

A036295



1ST DISTRICT, DIVISION 5, NO. A036295

S002953

IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA

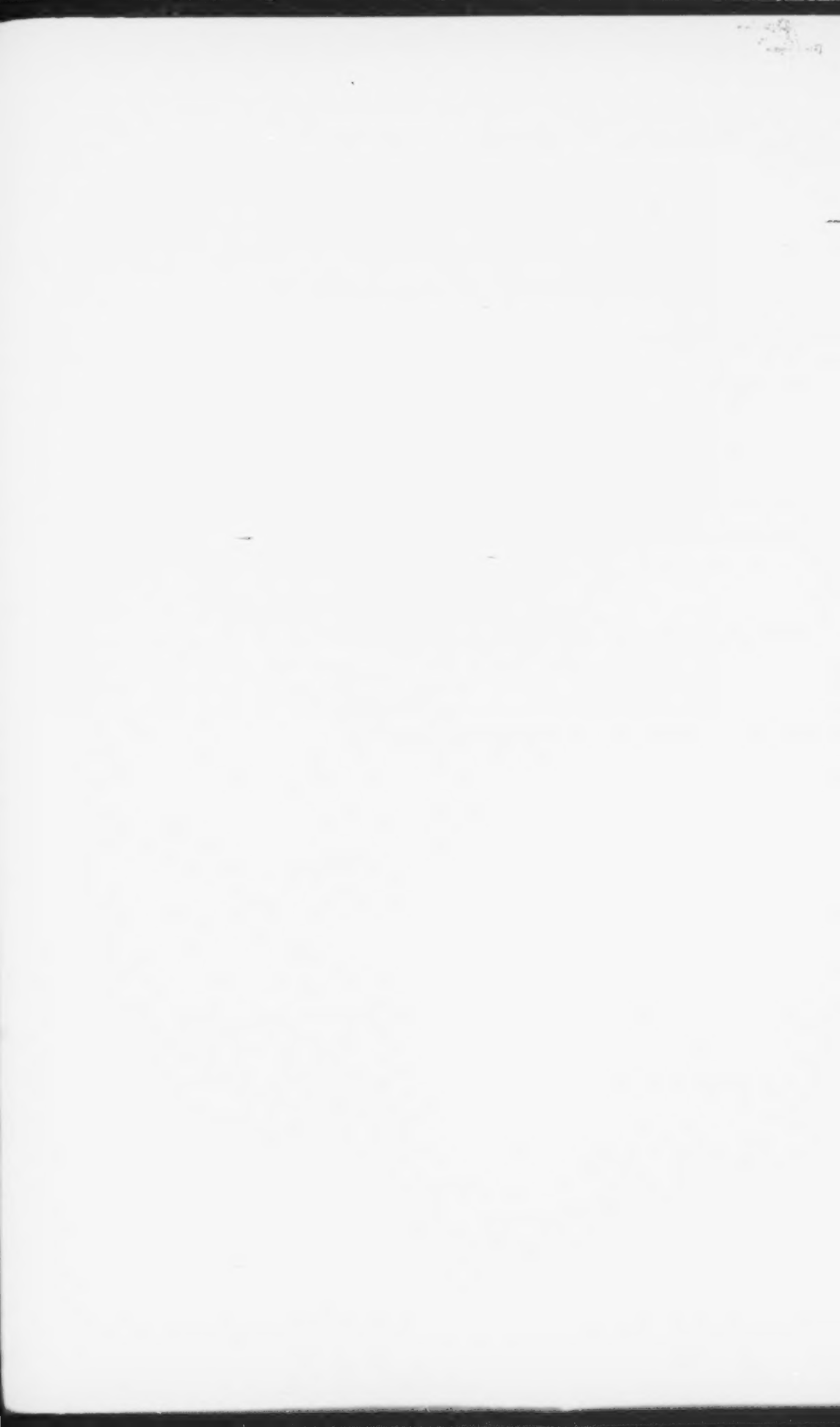
IN BANK

PHILLIPS v. CITY OF MARTINEZ

Appellant's petition for review DENIED.

(FILED DEC 22 1987)

Chief Justice (signed Lucas)



COURT OF APPEAL OF THE STATE OF
CALIFORNIA FOR THE FIRST APPELLATE
DISTRICT DIVISION: 5

Phillips, Melvin D., P.O. Box 1979,
Martinez, CA 94553

PHILLIPS, MELVIN D. vs CITY OF MARTINEZ,
ET AL. A036295 Contra Costa County No.
273655

REMITTITUR

I, RON D. BARROW, Clerk of the Court of
Appeal of the State of California, for
the First Appellate District, do hereby
certify that the decision entered in the
above-entitled cause on October 20, 1987
has now become final.

 Appellant ☒ Respondent to recover
costs

 Each party to bear own costs

 Costs are not awarded in this
proceeding

 See decision for costs determination

Witness my hand and the seal of the
Court affixed at my office this Jan 28
1988

RON D. BARROW, Clerk

By: (signed Hugh O'Con)

Deputy



SUPERIOR COURT OF CALIFORNIA, COUNTY OF
CONTRA COSTA. Case Number 273655 NOTICE
OF ENTRY OF REMITTITUR (FILED FEB 11,
1988)

MELVIN D. PHILLIPS, Plaintiff vs. CITY
OF MARTINEZ, et al. Defendant

To the above named parties and to their
attorneys of record: You are notified
that the Remittitur in this cause was
entered on Microfilm. Date 2-10-88.

JAMES R. OLSSON, County Clerk and Clerk
of the Superior Court of the State of
California for the County of Contra
Costa.

CERTIFICATE OF MAILING

I, JAMES R. OLSSON, County Clerk and
Clerk of the Superior Court of the State
of California for the County of Contra
Costa, and not a party to the within
action, hereby certify; that on the date
below, I served notice of entry
remittitur on the parties in the within
action, by depositing true copies
thereof, inclosed in sealed envelopes



with postage thereon fully prepaid in
the United States Post Office mail box
at Martinez, California addressed as
follows:

Melvin D. Phillips, P.O. Box 1979,
Martinez, CA 94553

Jeffrey A. Walter, Attorney at Law, 827
Third St., Santa Rosa, CA 95404

Dated: 2-11-88

JAMES R. OLSSON, County Clerk and Clerk
of the Superior Court of the State of
California for the County of Contra
Costa.

By (signed C. Grill) Deputy

NOTICE OF ENTRY OF JUDGMENT

Melvin D. Phillips, 511 First Street,
Rodeo, CA 94572 (415) 799-6400

In propria persona

SUPERIOR COURT OF CALIFORNIA, COUNTRY OF
CONTRA COSTA. Case No. 273655, FIRST
AMENDED COMPLAINT FOR DECLARATORY RELIEF
AND DAMAGES (FILED June 28, 1985)

MELVIN D. PHILLIPS, Plaintiff vs. CITY
OF MARTINEZ, a municipal corporation;
PETER LANGLEY, Vice Mayor; GARY
HERNANDEZ, City Council Member; BILL
POLLACEK, City Council Member; KATHY
RADKE, City Council Member; RICHARD
LOEWKE, City Planning Director; and DOES
1 through 10, inclusive; Defendants.
Plaintiff alleges:

FIRST CAUSE OF ACTION

1. Defendant CITY OF MARTINEZ is, and
at all times mentioned herein was, a
municipal corporation, duly organized
and existing under the laws of the State
of California and situated in the County
of Contra Costa.

2. At all times mentioned herein, defendants PETER LANGLEY, GARY HERNANDEZ, BILL POLLACEK, KATHY RADKE, and RICHARD LOEWKE are, and at all times mentioned herein were employees of defendant CITY OF MARTINEZ and in doing the acts hereinafter described, acted within the courses and scope of their employment.

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I THROUGH 10, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by said acts.



4. At all times herein mentioned, defendants DOES 1 through 10, inclusive, were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.

5. On or about October 15, 1984, plaintiff presented to the CITY OF MARTINEZ by delivering a claim to the clerk for the injuries, losses, and damages suffered and incurred by him by reason of the hereinafter-described occurrence, all in compliance with the requirements of Section 905 of the Government Code. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

6. On or about December 20, 1984, the CITY OF MARTINEZ rejected the claim in its entirety.



7. On July 18, 1984, and at all times herein mentioned, plaintiff was the owner in fee of certain real property situated in the City of Martinez, Contra Costa County, California, more particularly described in attached "Exhibit B" as a ±163 acre parcel which includes one single family dwelling.

8. On July 27, 1984, defendants forced plaintiff to dedicate an open-space scenic easement on their property to defendant CITY OF MARTINEZ as a precondition to the approval of issuance of a building permit to construct a single family residence on one acre of plaintiff's 163 acre parcel. This easement was imposed for public benefit in that the restriction increases ecological benefits to the public and decreases auto emissions and traffic in the area.

9. As a direct and necessary result of defendant's deliberate action in the

City Council Meeting of July 18, 1984, plaintiff was forced to dedicate the open-space easement, constituting an unlawful taking of his property rights.

10. Defendant City Council restricted plaintiff's use of his property which is currently zoned R7.5 (one house per 7,500 square feet) to one house per 120 acres. Defendant achieved this by forcing plaintiff to sign an open-space easement, and not through the proper method of changing the city zoning of the subject real property.

11. The reasonable value of the property prior to the City Council action was \$100,000 per acre.

12. The reasonable value of the property as now restricted is \$1,000 per acre for agricultural use.

13. As a result of the above-described unjust deprivation of plaintiff's use and enjoyment of his property, plaintiff has been damaged in the amount of



\$11,880,000. (120 acres x \$99,000).

14. Plaintiff has received no compensation for defendant's unjust taking of the use and enjoyment of his property.

15. Plaintiff has incurred and will incur attorney's appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

SECOND CAUSE OF ACTION

16. Plaintiff incorporates Paragraph 1 through 9 of his FIRST CAUSE OF ACTION as though set forth fully herein.

17. Defendant City Council has restricted plaintiff's ability to commence reasonable agricultural grading. This constitutes an unlawful taking of plaintiff's use of his land



for farming.

18. The reasonable value of the land for agricultural use is \$1,000 per acre.

19. The property under the restrictions imposed by defendants can only be used for grazing. The reasonable value for grazing land is \$400 per acre.

20. As a result of the above-described unjust deprivation of plaintiff's use and enjoyment of his property, plaintiff has been damaged in the amount of \$72,000. (120 acres x \$600)

21. Plaintiff has received no compensation for defendant's unjust taking of the use and enjoyment of his property.

22. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

THIRD CAUSE OF ACTION

23. Plaintiff incorporates paragraphs 1 through 9 of the FIRST CAUSE OF ACTION as though set forth fully herein.

24. Defendant City Council has restricted plaintiff's use of the subject property by imposing restrictions on the installation of overhead utilities and all electrical and communication services. Plaintiff is now forced to install underground utilities.

25. It is reasonably anticipated that approximately 5,000 feet of utility wire will be needed to service the 120 acre parcel.

26. The reasonable cost of such overhead utilities would be approximately \$2.50 per foot.

27. As a result of defendant City's action, plaintiff must now install underground utilities at a cost of \$6.00 per foot.

28. As a result of the above-described unjust deprivation of plaintiff's use and enjoyment of his property, plaintiff has been damaged in the amount of \$17,500.00 (5,000 feet x \$3.50)

29. Plaintiff has received no compensation for defendant's unjust taking of the use and enjoyment of his property.

30. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

FOURTH CAUSE OF ACTION

31. Plaintiff incorporates paragraphs 1 through 9 of the FIRST CAUSE OF ACTION as though set forth fully herein.



32. Defendant City has restricted the removal of oak trees on plaintiff's property through its imposition of the open-space easement.

33. The value of oak firewood, which is the least economical use of oak, is valued at \$65.00 per cord for standing oak.

34. Plaintiff is suffering detriment because of this restriction.

Plaintiff's inability to remove the oak, makes it impossible to use the land for farming and fruit growing activities.

35. There is approximately 10 cords of oak per acre on the subject property bringing the total amount of timber on the land to the figure of 1200 cords of oak.

36. As a direct result of defendant's action, Plaintiff has been damaged in the amount of \$78,000. (\$65.00 per cord x 1,200 cords).

37. Plaintiff has received no compensation for defendant's unjust



taking of the use and enjoyment of his property.

38. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

FIFTH CAUSE OF ACTION

39. Plaintiff incorporates paragraphs 1 through 9 of the FIRST CAUSE OF ACTION as though set forth fully herein.

40. Defendants forced plaintiff to give them an emergency access easement through the property. Said access deprives plaintiff use of 30,000 square feet (20' wide, 1500' long) of his property without just compensation.

41. The value of this acreage is \$75,000. ($3/4$ acre x \$100,000). As a direct result of defendant's action,

plaintiff has been damaged in this amount.

42. In addition, this easement is an encumbrance against plaintiff's property and contributes further to plaintiff's detriment.

43. Plaintiff has received no compensation for defendant's unjust taking of the use and enjoyment of his property.

44. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

SIXTH CAUSE OF ACTION

45. Plaintiff incorporates paragraphs 1 through 9 of the FIRST CAUSE OF ACTION as though set forth fully herein.

46. On or about July 18, 1984 defendants abused their authority when they conditioned the approval of plaintiff's building permit on plaintiff's grant of an open-space easement to the City of Martinez.

47. The subject \pm 163 acre property is according to the defendant, in a visually significant area, the property has greater than 20% slope, and it is in a seismic fault area. These conditions place the approval of a building permit under the jurisdiction of the City of Martinez Planning Commission.

48. Defendants misused their authority by applying irrelevant ordinances against plaintiff to prevent and frustrate his intent to develop his property.

49. This use of the process was not authorized in the regular course of the proceeding.

50. Defendant's ulterior purpose and motivation in so misusing the process in the above-described manner was to obtain

a collateral advantage over the plaintiff. Defendant's action of forcing plaintiff to sign the open-space easement had the effect of placing burdensome and invalid restrictions upon him, thereby depleting his very limited financial resources, resulting in the frustration of his desire to develop his property.

51. The open-space easement is a legal document by which defendant's have used to deprive plaintiff the current and future use and enjoyment of his property. Defendants exceeded the limit of their discretionary authority by giving plaintiff no choice but to sign the open-space easement or abandon his entire project. Therefore plaintiff requests rescission of the open-space scenic easement.

52. Defendant's additional ulterior purpose and motivation in so misusing the process in the above-described manner was to enhance their individual

standing in the community as City Council Members and the City Planning Director to ensure personal gain.

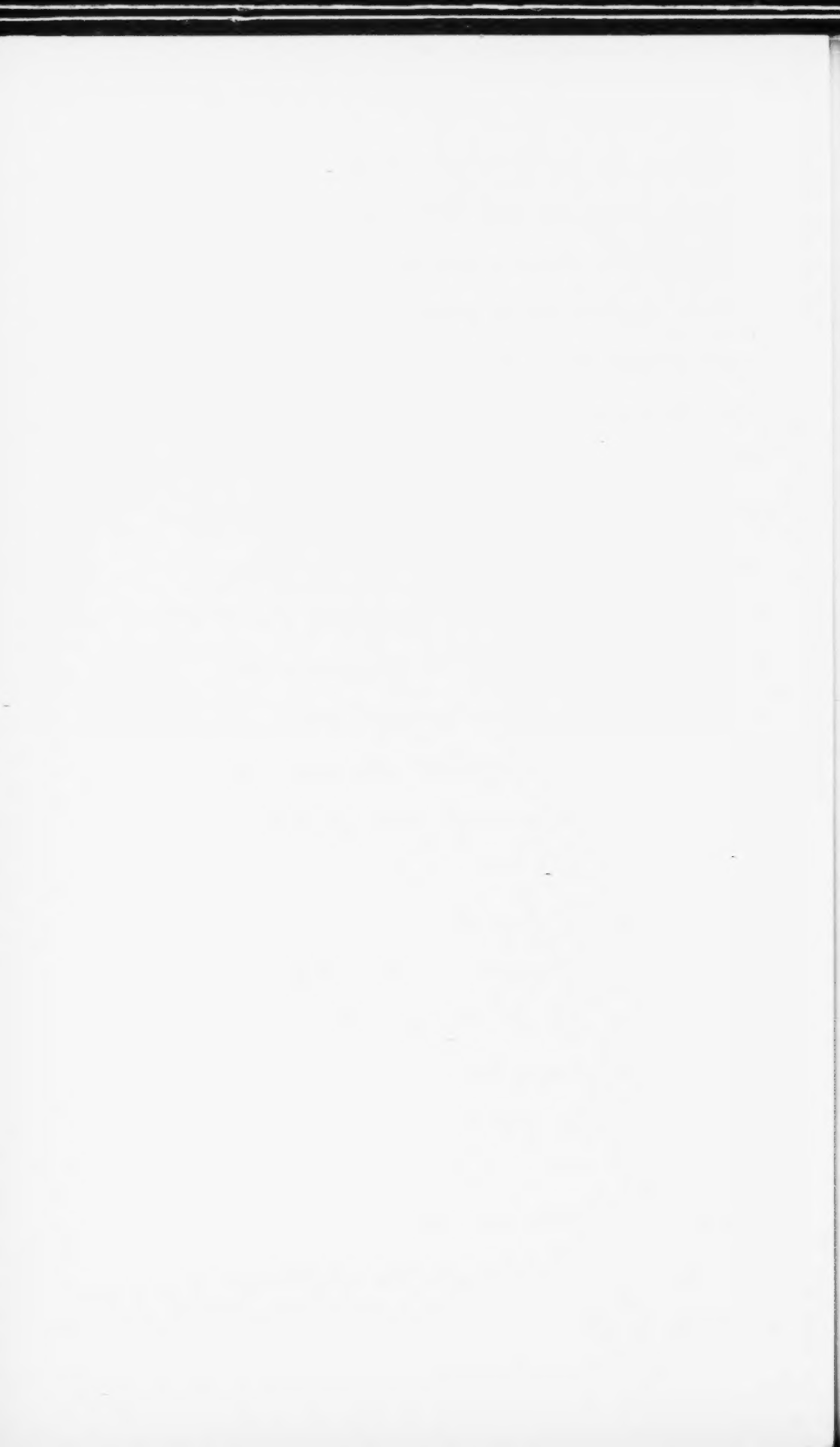
53. As a proximate result of defendant's above-described actions, plaintiff has been damaged generally in the sum of \$35,000.

54. At all times mentioned herein, defendants acted willfully with the wrongful intention of injuring plaintiff and from an improper or evil motive amounting to malice in that defendants have deprived plaintiff the use and enjoyment of his land without due process.

55. Defendants did the things herein alleged maliciously and to oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages in the sum of \$1,000,000.

SEVENTH CAUSE OF ACTION

56. Plaintiff incorporates paragraph 1 through 9 of the FIRST CAUSE OF ACTION



as though set forth fully herein.

57. Plaintiff is informed and believes that RICHARD LOEWKE, City Planning Director conceived and initiated the idea of imposing the open-space easement on the subject property as a condition to the approval of plaintiff's building permit.

58. Plaintiff is further informed and believes that defendant RICHARD LOEWKE communicated and convinced defendant City Council members that the imposition of the easement was a necessary condition to granting the building permit.

59. Defendant City Council members acquiesced and approved of the imposition of this restriction on plaintiff as a condition to the granting of the building permit.

60. This action on the part of defendant RICHARD LOEWKE has deprived plaintiff his ability to use the land as he desires and has created an emotional



distress on plaintiff causing him to suffer damages for loss of income not yet ascertainable.

61. These tortious acts of defendants were intentional and were perpetrated with the intent to invoke emotional distress upon plaintiff and to further cause financial damages in amounts great enough to prohibit plaintiff from developing his property for beneficial use.

62. Plaintiff communicated to defendants his intent to construct one single family residence on 120 acres and conduct farming activities.

63. Defendant RICHARD LOEWKE made the granting of the open-space easement prerequisite to the approval of a building permit. This directly prohibited plaintiff from using his land to raise livestock, farm and grow fruit.

64. The restrictions in the easement were specifically included to deprive plaintiff the use and enjoyment of his



land.

65. Plaintiff signed the open-space easement under protest on July 27, 1984 for the sole purpose of mitigating the damages suffered by plaintiff as a result of the actions of defendants. Had plaintiff not so acted, his damages would be substantially greater. The building of plaintiff's residence would not have taken place. The financial commitments of family members would have terminated making the completion of the project impossible, and the financial structure of the entire family would have collapsed.

66. As a proximate result of defendant's above-described actions, plaintiff has been damaged in the sum of \$8,000.

67. Defendants did the things herein alleged maliciously and to oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages in the sum of \$100,000 from each and every separately named defendant

herein.

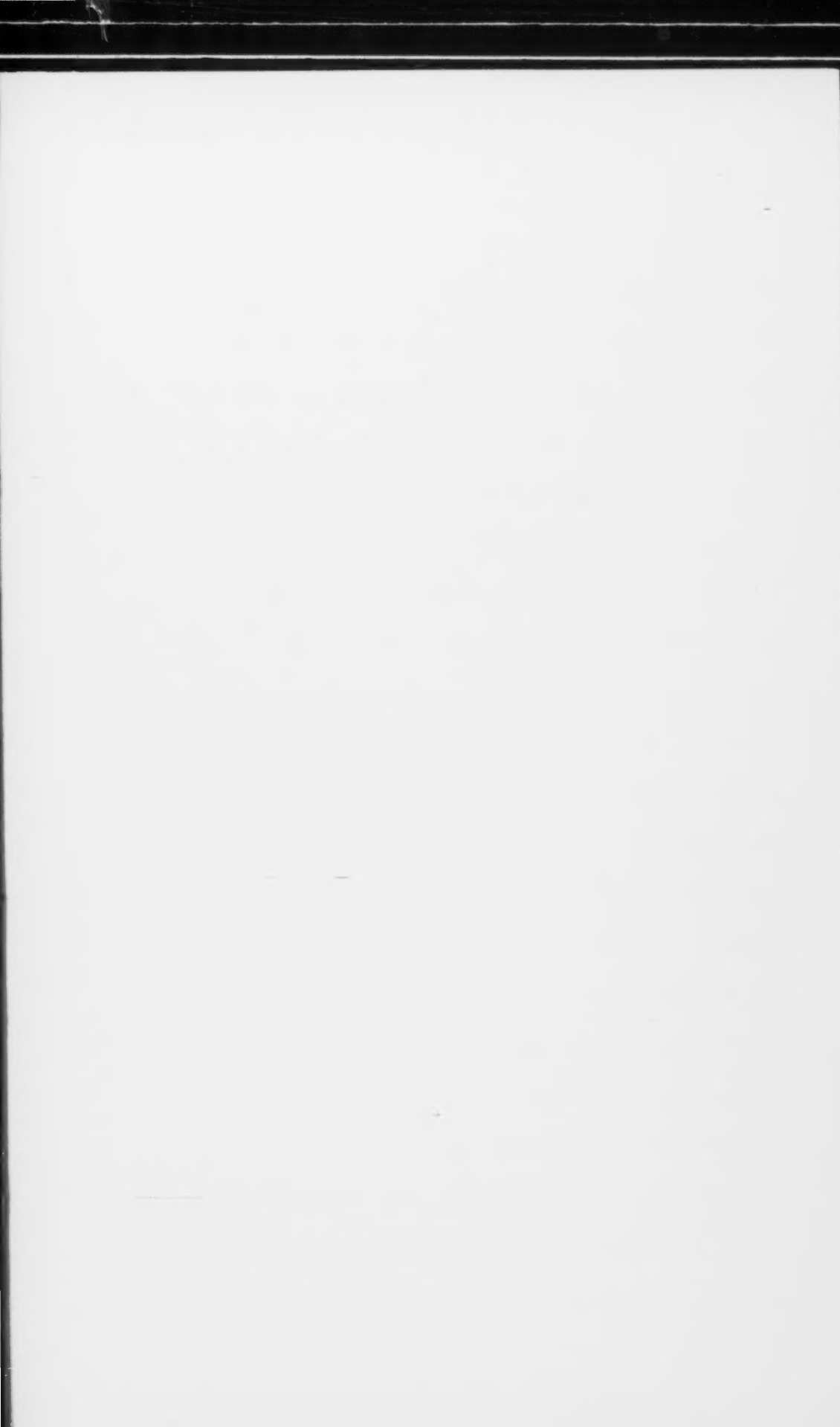
EIGHTH CAUSE OF ACTION

68. Plaintiff incorporates paragraph 1 through 9 of the FIRST CAUSE OF ACTION as though set forth fully herein.

69. At all times mentioned herein, defendants PETER LANGLEY, GARY HERNANDEZ, BILL POLLACEK, KATHY RADKE, and RICHARD LOEWKE are, and at all times mentioned herein were the persons charged by law with the duties of administering the ordinances hereinafter specified.

70. Defendant alleges that an ordinance exists which gives defendants the right to impose conditions, such as the granting of an open-space scenic easement, on the issuance of building permits in the city of Martinez.

Defendants have not, as yet, produced a copy of this ordinance for the review of plaintiff despite plaintiff's request of them to do so.



71. Plaintiff specifically requested a copy of the city ordinances that were being imposed against him. Plaintiff tendered payment to the city clerk for a copy of these ordinances and was told by the clerk that copies of these ordinances were unavailable for public review. Plaintiff was further told that in order to obtain copies of the ordinances requested, he would have to ask each individual department for the ordinances pertaining to their particular jurisdiction.

72. An actual controversy has arisen and now exists between plaintiff and defendants relative to their respective rights and duties in that plaintiff contends that the ordinance is invalid and unenforceable, both on its face and as construed by defendants in that it violates the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 7(a) of the California

Constitution. Defendants dispute this contention and contend that the ordinance and its application to plaintiff's above-described activity are valid.

73. Plaintiff additionally challenges the validity of the design review ordinance as imposed against them by defendants in that it also violates the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 7(a) of the California Constitution. Defendants dispute this contention and contend that the ordinance and its application to plaintiff's above-described activity are valid.

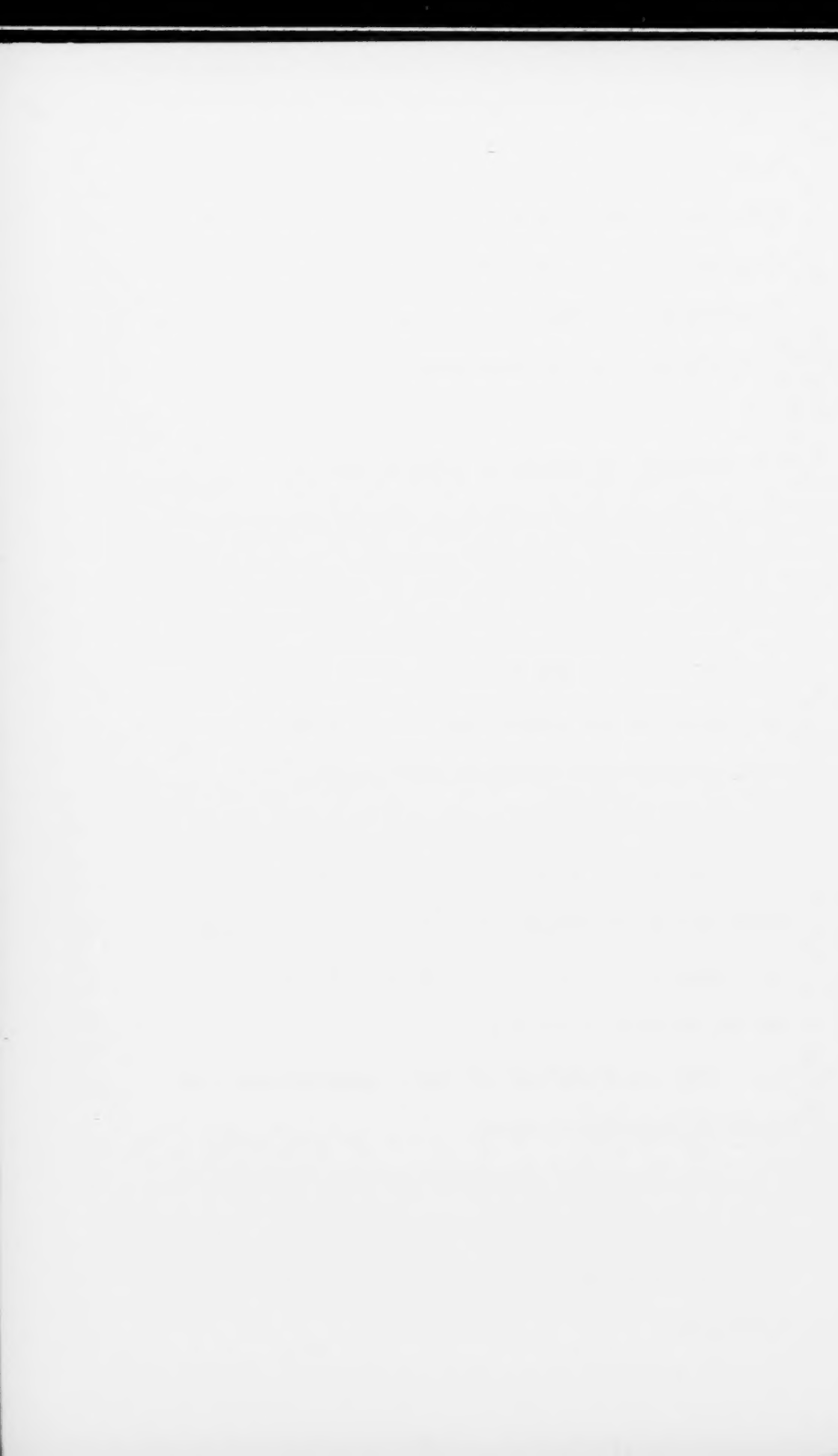
74. Plaintiff desires a declaration as to the validity of the both ordinances, as applied to plaintiff's activities, and if they are found to be valid, whether plaintiff's above-described activities are violative of them. A judicial declaration is necessary and



appropriate at this time so that plaintiff may ascertain his rights and duties in the premises without first subjecting himself to liability by violating the ordinances.

WHEREFORE, plaintiff prays for a declaratory judgment as follows and for judgment against defendants as follows:

1. Declaring the respective rights and duties of the parties under the ordinances in question, that the ordinances are unconstitutional, invalid, and void on their face or as applied to plaintiff, or if the ordinance is found to be valid, it does not apply to plaintiff's activities hereinabove described.
2. For rescission of the open-space and scenic easement deed.
3. For general damages in the amount of \$12,157,500.00 with interest thereon at the legal rate from the date of the damages;



4. For exemplary or punitive damages in the amount of \$1,600,000.00

5. For damages for mental and emotional distress in the sum of \$8,000.00

6. For reasonable attorney's, appraisal, and engineering fees according to proof;

7. For cost of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

dated: June 18, 1985

MELVIN D. PHILLIPS (signed Melvin D. Phillips)

VERIFICATION

I, MELVIN D. PHILLIPS, am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 18, 1985, in Rodeo, California.
MELVIN D. PHILLIPS (signed Melvin D. Phillips)



EXHIBIT "A"

NOTICE OF CLAIM AGAINST CITY OF
MARTINEZ, CALIFORNIA

Melvin Phillips, herewith presents a claim against the City of Martinez, County of Contra Costa, State of California; in the sum of \$475,000. for damages, other personal and real property damages.

CLAIMANT'S ADDRESS: 511 First Street
Rodeo, CA PHONE #: 799-6400

PLACE OF OCCURRENCE: City Hall, Martinez
DATE(S): July 18, 1984 July 27, 1984

SAID CLAIM ARISES FROM THE FOLLOWING
CIRCUMSTANCES:

Restrictions placed upon the real and personal property of Melvin Phillips by the city of Martinez.

ITEMS, NATURE AND EXTENT OF DAMAGES OR
INJURIES:

Loss of use of real and personal property and diminution in the value of real and personal property.

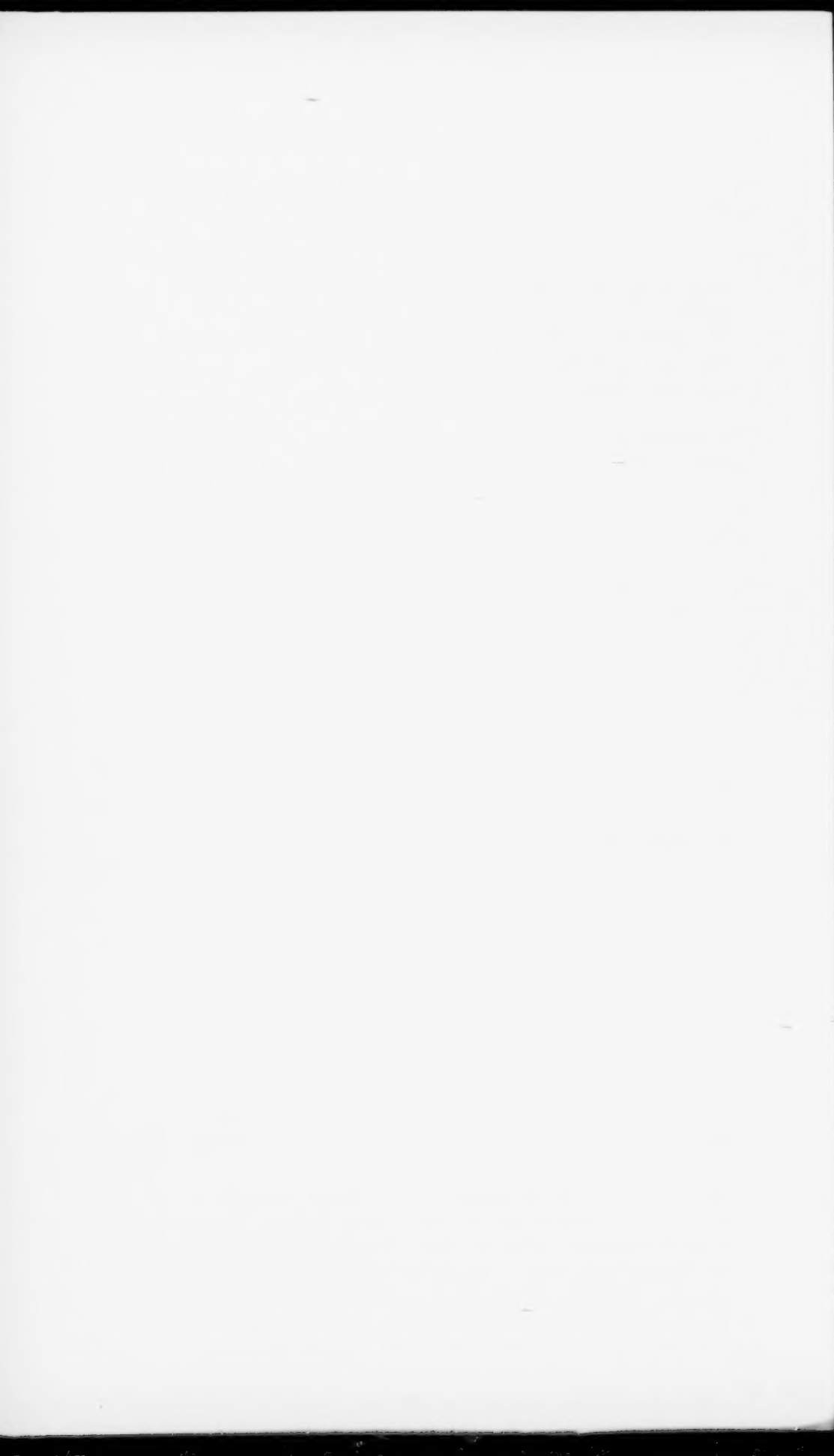
DATED: October 12, 1984

Claimant(s) Melvin Phillips (signed
Melvin Phillips)

Receipt of the above claim is hereby acknowledged this 15th day of October, 1984.

City Clerk, City of Martinez (signed
Beckey)

I/We, the undersigned, declare under penalty of perjury that I/We have read the foregoing claim for damages, and know the contents thereof; that the same is true and my/our own knowledge and belief, save and except as to those matters wherein stated on information and belief, and as to them, I/We believe it to be true.



Dated at Rodeo, this 12 day of October,
1984.

RETURN TO:

City of Martinez, 525 Henrietta Street,
Martinez, CA 94553

(Signed Melvin Phillips)

THIS FORM MUST BE FILED WITH THE CITY OF
MARTINEZ WITHIN 100 DAYS FROM DATE OF
LOSS OF INJURY.

DATE MAILED: 10/10/84

BY: (signed M. Cabial)

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA FIRST APPELLATE DISTRICT.
CONTRA COSTA COUNTY SUPERIOR COURT JUDGE
DOLGIN

NUMBER 273655

DISTRICT COURT OF APPEAL NUMBER A036295
(Received May 26, 1987 filing date
unknown)

MELVIN D. PHILLIPS, Plaintiff &
Appellant, vs. CITY OF MARTINEZ, et al,
Defendants & Respondents.

APPELLANT'S OPENING BRIEF

MELVIN D. PHILLIPS, POST OFFICE BOX
1979, MARTINEZ, CALIFORNIA 94553
(415) 372-3394

In Pro Per

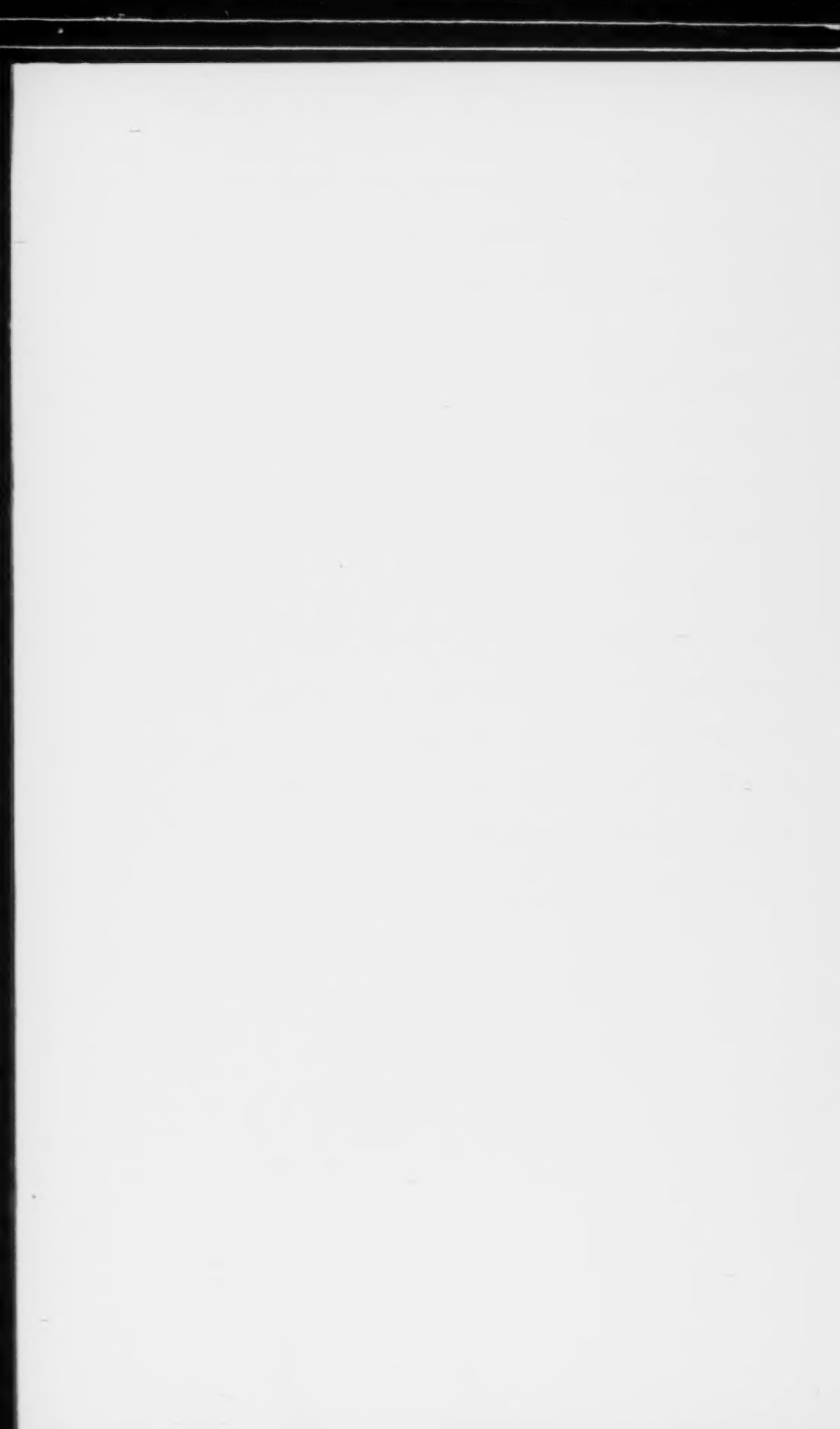


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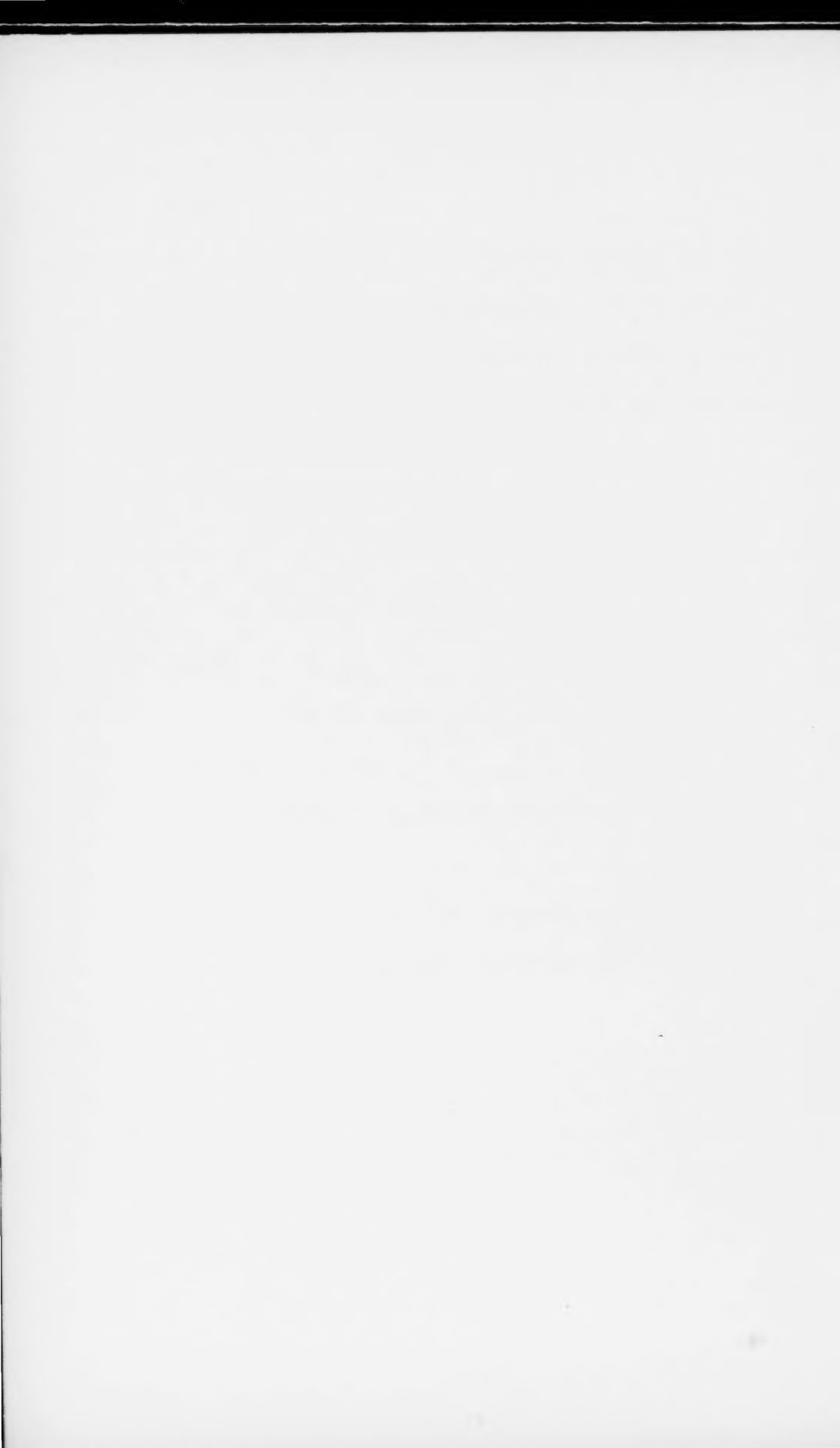
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I.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In December, 1983, Plaintiff purchased approximately 160 acres of land within the city limits of Martinez. Plaintiff applied for, and eventually received, permission to obtain a building permit, for a single family dwelling, on his parcel of land in the City of Martinez. Plaintiff complied with all of the conditions imposed by the Planning and Building Department, pertaining to Plaintiff's single family residence. Plaintiff then asked for a building permit for the dwelling.

Defendant, RICHARD LOEWKE, was the director of the Martinez Planning Department. Mr. Loewke informed the Plaintiff that if the Plaintiff did not sign a document giving an easement to the City of Martinez for 120 acres of Plaintiff's property, then the City

would not issue the building permit. Plaintiff signed the document under protest, submitted a claim to the City of Martinez for damages, and filed a complaint in this action.

The attorney for the City of Martinez filed a demurrer to the complaint.

Judge Dolgin of the Superior Court of Contra Costa County sustained Defendants' demurrer without leave to amend. Plaintiff asked for a reconsideration on the matter. The reconsideration was denied. Plaintiff then appealed the action.

B. JURISDICTION OF THE APPELLATE COURT

This appeal is made from a judgment and order of the Contra Costa Superior Court. The Superior Court granted a demurrer without leave to amend against Plaintiff and Appellant in this action.

(CT p.88 & 89)

CCP § 904.1. Superior Courts; appealable judgments and orders.

An appeal may be taken from a superior court in the following cases.



- (a) From a judgment.....
- (b) From an order made after a judgment made appealable by subdivision (a).....

C. GROUNDS FOR THE APPEAL

Error was made by the Superior Court Judge in drawing legal conclusions, and assuming the City had the power to make the alleged conditional easement. The Judge further erred in assuming that the only cause of action which he recognized ought to have been brought to the court's attention by means of a writ of mandate, and therefore, was "time-barred". (CT p.76 & 77)

"1. First-fifth Causes of Action are apparently actions for damages under the theory of inverse condemnation." (CT p.76, 1.21)

The complaint must state facts that give rise to a cause of action. If the Judge was uncertain as to the causes of action, he should have allowed the Plaintiff an opportunity to amend the pleadings.

(3,4) The allegations in a complaint are treated as true for the purposes of ruling on a demurrer (Custodio v. Bauer (1967) 251 Cal.App.2d 303, 59 Cal.Rptr. 463; Berman v. Allan (1979), 80 N.J. 421, 404 A.2d8) and

a demurrer should not be sustained without leave to amend if there is a reasonable possibility that a defect in the complaint can be cured by amendment. (Minsky v. Los Angeles (1974) 11 Ca.3d 113, 520 P.2d 726).. CALL v. KEZIRIAN (1982), 185 Cal.Rptr. 103 p.106, 135 Cal.App.3d 189 p.195.

If the complaint states any cause of action, the demurrer should have been denied.

CCP § 472c. Demurrer sustained without leave to amend; appeal on question of abuse of discretion

When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made; provided, however, that this section shall not apply to any pending action or proceeding.

(4)...We are also to be guided by the following basic principle: All that is necessary against a general demurrer is that, upon a consideration of all the facts stated, it appears that the Plaintiff is entitled to any judicial relief against the Defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the Plaintiff may demand relief to which he is not entitled under the facts alleged. (Gressley v. Williams, 193 Cal.App2d 636, 639, 14 Cal.Rptr. 496: Hilltop Properties



Inc.. v. State of California, 233
Cal.App.2d 349, 453, 43
Cal.Rptr.605.)....
HOLMES v. CITY OF OAKLAND (1968) 67
Cal.Rptr 197 p.200, 260 Cal.App.2d
378

D. CAUSES OF ACTION ALLEGED IN THE
COMPLAINT

The alleged acts of the Defendants are
either compensable or illegal, depending
on whether the easement had any
reasonable connection to the building
permit.

"...Defendants forced Plaintiff to
dedicate an open-space scenic
easement on their property to
Defendant, City of Martinez, as a
precondition to the approval of
issuance of a building permit to
construct a single family
residence..." (CT p.3, 1.8)
(emphasis added)

Gov. Code §65909. Conditions for
issuance of variance,
building or use
permits

No local government body, or any agency
thereof, may condition the issuance of
any building or use permit or zone
variance on any or all of the following:
(a) The dedication of land for any
purpose not reasonably related to the
use of the property for which the
variance, building, or use permit is
requested...

If facts show a relationship between the
easement and the building permit,

Plaintiff is entitled to compensation from the City of Martinez.

(11-13) Nor do we agree with the District's contention the ordinance requiring "easement" agreements effected valid dedications pursuant to Imperial County's police power. A regulatory body may constitutionally require a dedication of land as a condition of development and such a dedication requirement is not viewed as an act of eminent domain. (Associated Home Builders, etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, 638-640, 94 Cal.Rptr. 630, 484 P.2d 606; Georgia-Pacific Corp. v. California Coastal Com. (1982) 132 Cal. App.3d 678, 699, 183 Cal.Rptr. 395.) However, there are limitations on the government's power to require a dedication. The dedication requirement must be reasonably related to the use of the property as viewed in light of its impact on the surrounding community (both in the present and the future) and its impact on the general welfare of the community. (Associated Home Builders, etc., Inc. v. City of Walnut Creek, supra, 4 Cal.3d 633, 639, 94 Cal.Rptr. 630, 484 P.2d 606; Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 89 4 Cal.Rptr. 493, 351 P.2d 765; see also Gov. Code Section 65909; Ayres v. City Council of Los Angeles (1949) 34 Cal.2d 31, 38, 207 P.2d 1.) Additionally, any government action, including a dedication requirement, which deprives the owner of all reasonable use of his property amounts to a taking of property which must be compensated. (emphasis added)

SALTON BAY MARINA v. IMPR. IRR. DIST. (1985) 218 Cal.Rptr. 839 p.851, 172 Cal.App.3d 914 p.936



1. First Cause of Action

"10. Defendant, City Council, restricted Plaintiff's use of his property which is currently zoned R7.5....." (CT p.3, 1.20)

"Third: The Grantors, their heirs, successors, and assigns shall not further subdivide the subject property...." (CT p.48, p.3)

The complaint, along with the recorded easement, clearly shows a taking by the City, in that the easement prohibited the Plaintiff from subdividing his property. The City should compensate Plaintiff under Gov. Code §65909 for the taking of Plaintiff's property by the City.

2. Second Cause of Action

"17. Defendant, City Council, has restricted Plaintiff's ability to commence reasonable agricultural grading...." (CT p.4, 1.17 1/2)

"SECOND: The Grantors, their successors and assigns shall refrain from doing any of the following acts upon the subject property,...." (CT p.47, p.3)

"3. Engage in or permit any grading activity...." (CT p.47, p.6)

The grading restriction prevents the Plaintiff from using the property for



agricultural purposes. Again, Plaintiff should be compensated for the taking by the City.

3. Third Cause of Action

Plaintiff's third cause of action against the City, arises from the increased cost to the Plaintiff due to the requirement, imposed in the easement, of installing underground utilities.

4. Fourth Cause of Action

"Defendant, City, has restricted the removal of oak trees on Plaintiff's property...."

"Second: The Grantors,....shall refrain from.... (CT p.47, p.3)

"7. Removal of trees,....over 12" in diameter (3' above the ground)..." (CT p.48, p.2)

Again the Plaintiff should be compensated for the easement taking by the City, that restricts the Plaintiff's use of his land.

5. Fifth Cause of Action

"40. Defendants forced Plaintiff to give them an emergency access easement through the property." (CT p.7, 1.15)



The fifth cause of action is for an emergency access easement, that the City claimed was a condition to the building permit. The access easement does not appear in the recorded easement, but the Plaintiff made this allegation, so that the access easement issue would be resolved with the other issues in the complaint.

6. Sixth Cause of Action

"48. Defendants misused their authority by applying irrelevant ordinances against Plaintiff to prevent and frustrate his intent to develop his property."

"49. This use of the process was not authorized in the regular course of the proceeding." (CT p.8, 1.19)

The City Council of Martinez possessed, and had the power to deligate, quasi-judicial power to the planning commission. Misuse of quasi-judicial power constitutes a cause of action against the City for the abuse of process.

(10,11) A Municipality may lawfully confer quasi-judicial powers on boards or commissions dealing solely with municipal affairs. This power is acquired by municipalities under Article



XI, section 8 1/2, subdivision 4 of the Constitution. LE STRANGE v. CITY OF BERKELEY (1962) 26 Cal.Rptr. 550 p.556, 210 Cal.App.2d 313

If the easement did not have any reasonable relationship to the building permit, then the City did not have the power to make the requirement. The City's actions violated Gov.C § 65909.

(2)...The tort of abuse of process is defined in the Restatement as follows: "One who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby." (3 Rest., Torts, § 682, p. 464; Spellens v. Spellens, 49 Cal.2d 210, 231, 317 P.2d 613; Tranchina v. Arcinas, 78 Cal.App.2d 522, 525, 178 P.2d 65.) The gist of the tort is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish; and its essential elements are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings.

KYNE v. EUSTICE (1963) 30 Cal.Rptr. 391 p.394, 215 Cal.App.2d 627

The City was under a duty to issue a building permit to the Plaintiff without any unrelated conditions.

(10)...The obvious facts are that the charter and the ordinances of the petitioner city and county fully prescribed the conditions which must be met by those who would construct apartment dwellings, and specify the

procedures which shall be followed by those who would secure permits. These conditions and procedures are, of course, the standards which must govern the appropriate administrative agencies, including both the planning commission and the board of permit appeals.

CITY AND COUNTY OF SAN FRANCISCO v. SUPERIOR COURT (1959) 1 Cal.Rptr. 158 p.167, 53 Cal.Rptr.2d 236

7. Seventh Cause of Action

"57. Plaintiff is informed and believes that Richard Loewke, City Planning Director conceived and initiated the idea of imposing the open-space easement on the subject property as a condition to the approval of Plaintiff's building permit.

58. Plaintiff is further informed and believes that Defendant Richard Loewke communicated and convinced Defendant City Council members that the imposition of the easement was a necessary condition to granting the building permit.

59. Defendant City Council members acquiesced and approved of the imposition of this restriction on Plaintiff as a condition to the granting of the building permit." (CT p.10, 1.3 1/2)

"Whereas, the city Council imposed a condition requiring the dedication of 120 + acres of this property to the City of Martinez as an open space and Scenic Easement prior to issuance of Building Permits." (CT p.44, p.2)

The combined wrongful acts of the City employees and the City Council constitute a civil conspiracy against the Plaintiff.



(1,2) To the actionable (conspiracy) the alleged combination must result in the commission of a civil wrong, either by the perpetration of an unlawful act or some injurious act by unlawful means, resulting in damage...

YOUNAN v. EQUIFAX INC. (1980) 169

Cal.Rptr 478 p.484, 111 Cal.App.3d 498 p.508

(4) The law imposes the obligation that every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights. The duty is independent of the contract and attaches over and above the terms of the contract. The fact that there existed a contract between the plaintiff and the defendant would not immunize the latter from penalty that is ordinarily visited upon tortfeasors. (Jones v. Kelly (1929) 208 Cal. 251, 280 P.942.)

(5) A cause of action for conspiracy will lie against agents and employees of insurers even though the former are not parties to the agreement of insurance when they join the insurer in a conspiracy to defraud the insured. As such, they are jointly liable with those with whom they conspire to commit the tort...

YOUNAN v. EQUIFAX INC. (1980) 169

Cal.Rptr. 478 p.486, 111 Cal.App.3d 498 p.511

8. Writ of Mandata vs. Declaratory Relief

A writ of mandate is not an appropriate remedy where complex issues of fact, as in this case, must be decided by the jury.

There are several complex issues in this case requiring the consideration of a jury: The purpose for requiring the easement, the legitimacy of requiring such an easement, and the appropriate compensation that the City ought to be required to pay the Plaintiff.

(3-6)...Use of the extraordinary remedy of mandamus is appropriate only when other remedies are inadequate. Because a lengthy trial is often necessary to determine the complex question whether a garnishee's debt is owed to the garnishor's judgment debtor or to the latter's assignee, remedies other than mandamus are better adapted to resolve such an issue and protect the rights of the parties during the interim period of resolution...EILKEN v. MORRISON (1969)
83 Cal.Rptr. 336 p.338, 3 Cal.App.3d 25 p.29

Plaintiff alleged in the eighth cause of action,

"...A judicial declaration is necessary and appropriate at this time so that Plaintiff may ascertain his rights and duties in the premises without first subjecting himself to liability by violating the ordinances." (CT p.13, 1.11)

CCP § 1060. Right of action; actual controversy; scope; effect of declaration

Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the



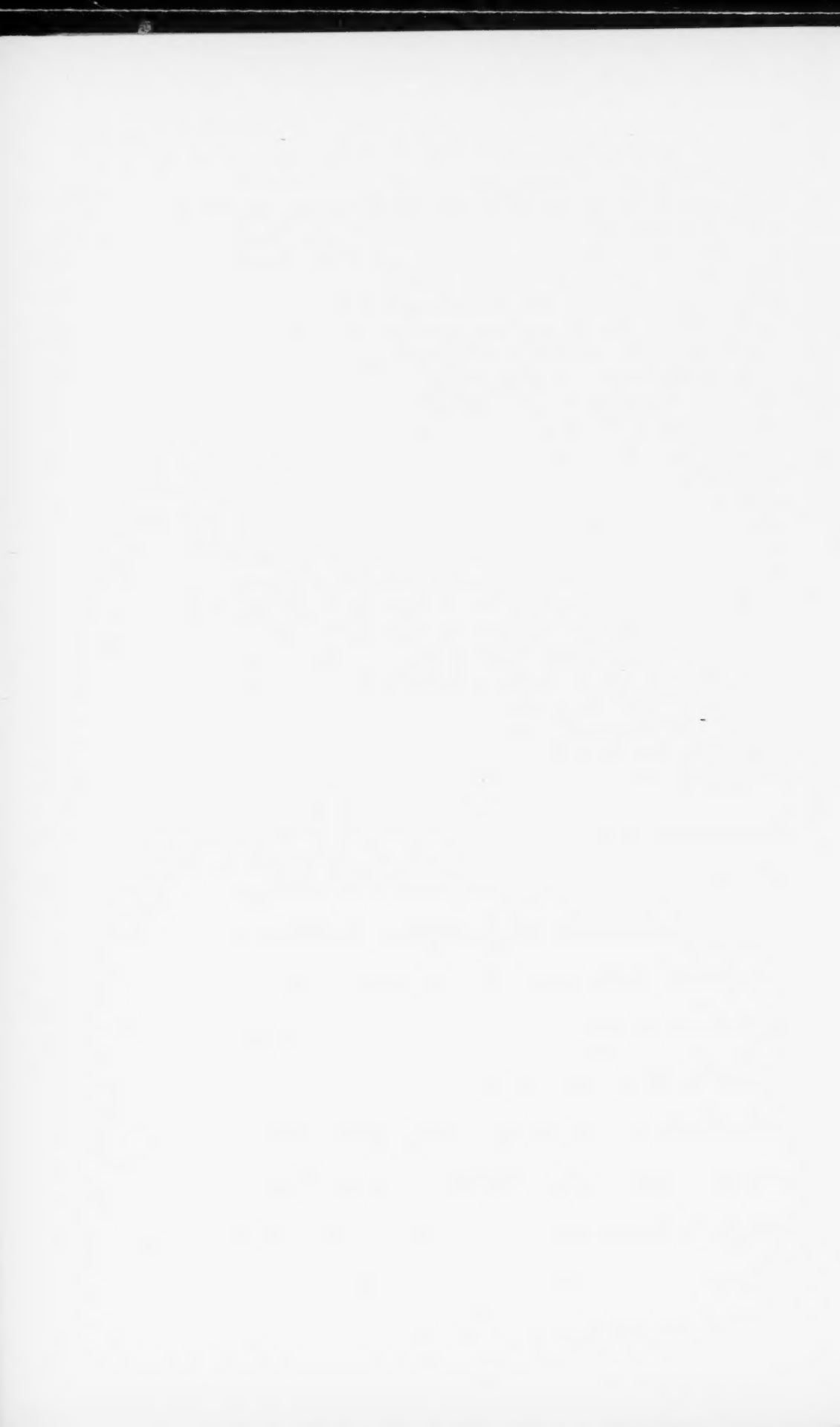
location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior, municipal or justice court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

9. Punitive Damages

Government Code § 818 protects the public entity from punitive damages.

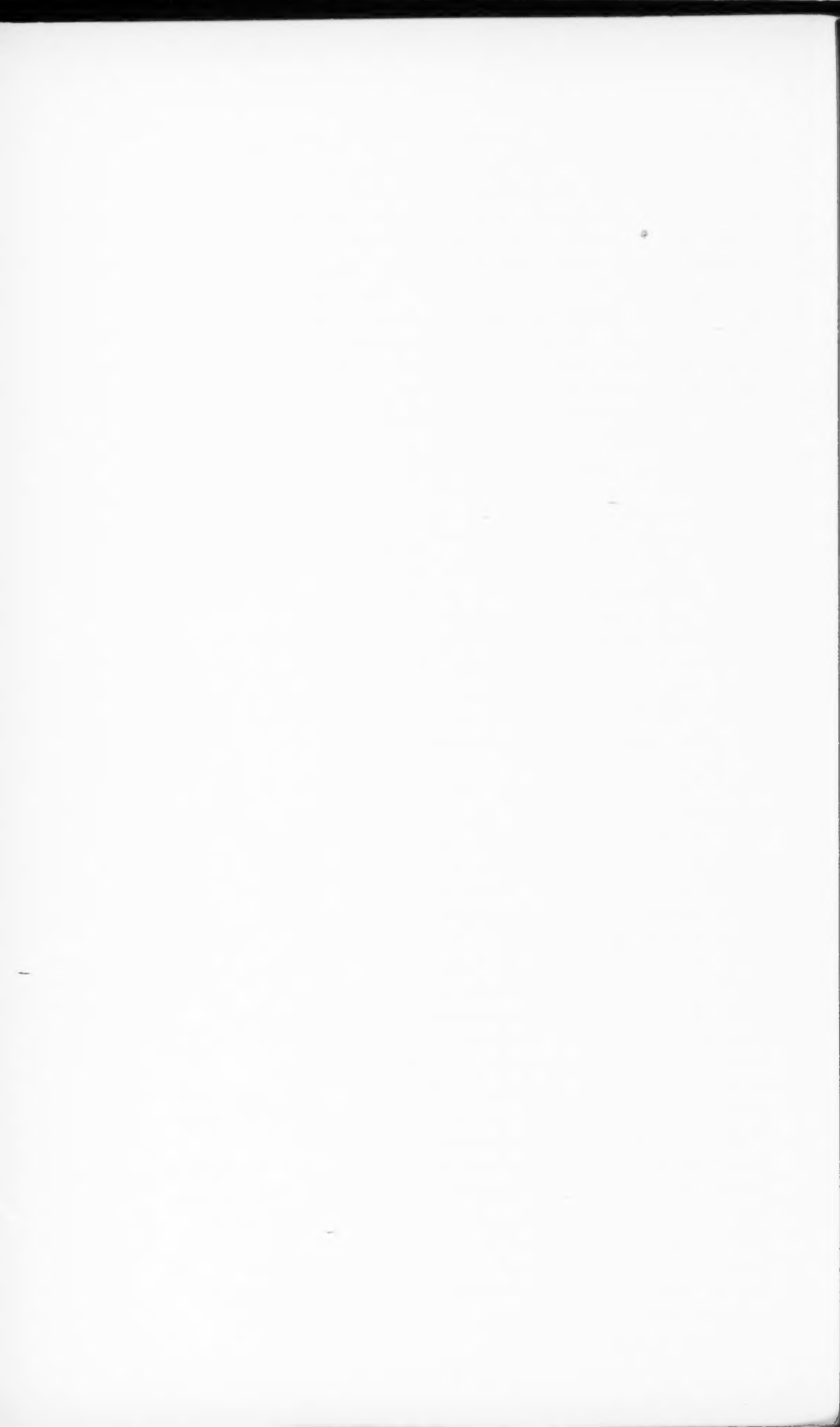
The code does not afford the same protection for the acts of individuals working for the City.

In addition, case law has held that an award higher than normal, that more fully compensates the Plaintiff for his losses, is allowed, and is not in violation of Gov. C. §818.



(4,5) It seems clear to us that section 818 of the Government Code, in referring to "damages imposed primarily for the sake of example and by way of punishing the defendant" contemplates, as the comment to the section by the California Law Revision Commission indicates, punitive damages which are designed to punish the defendant rather than to compensate the Plaintiff. Punitive damages are by definition in addition to actual damages and beyond the equivalent of harm done. (Carter v Agricultural Ins. Co., supra, 266 Cal.App.2d 805, 807, 72 Cal.Rptr. 462; Rest., Contracts, § 342, com. a, at p. 561.) In view of these well-settled propositions and the long prevailing rationale of Horst that the increased award provided by section 4553 contemplates more fully compensating the plaintiff for an industrial injury rather than penalizing the employer, we hold that the award made here does not violate section 818 of the Government Code.

Our interpretation of section 818 is supported further by section 814.2 of the Government Code, which provides that nothing in the portion of the code relating to the liability of public entities and employees (including § 818) shall be construed to impliedly repeal any provision of division 4 of the Labor Code, which includes section 4553. The Law Revision Commission commented on section 814.2: "This section makes clear that the statute relating to the liability of public entities and public employees has no effect on rights under the Workmen's Compensation Act." Sections 814.2 and 818 of the Government Code would be irreconcilable if we were to interpret the additional award for serious and willful misconduct as punitive in nature. Our conclusion that such an award is merely more adequate compensation rather than punishment avoids that result.



STATE DEPT. OF CORRECTION v. WORKMEN'S
COMP. (1971 97 Cal.Rptr. 786 p.790, 5
Cal.App.3d 885 p.891

3. FEDERAL QUESTIONS

Any law or rule that prevents the
Plaintiff his right to have the dispute
tried violates Plaintiff's
constitutional rights.

U.S. Const. Amend I Congress shall make
no law...prohibiting...the right of the
people...to petition the Government for
a redress of greivances.

The constitutional protection of
Plaintiff's property must be
adjudicated.

U.S. Const. Amend V ...nor shall private
property be taken from public use,
without just compensation.

The laws of the State must also be
uniformly applied.

The City cannot exempt themselves from
State or Federal laws.

U.S. Const. Amend XIV Sec. 1 ...nor
shall any State deprive any person of
life, liberty, or property, without due
process of law; nor deny to any person
within its jurisdiction the equal
protection of the laws.

(15-17) The fundamental conception of a
court of justice is condemnation only
after notice and hearing. No one may be
deprived of anything which is his to
enjoy until he shall have been divested



thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge, Matter of Lambert, 134 Ca. 626, 632-633, 66 P. 851, 55 L.R.A. 856; it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence. Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm., 74 Cal.App.2d 911, 170 P.2d 36..
IN RE BUCHMAN'S ESTATE (1954) 47 ALR.2d 291, 123 Cal.App.2d 546, 267 P.2d 73, p.84

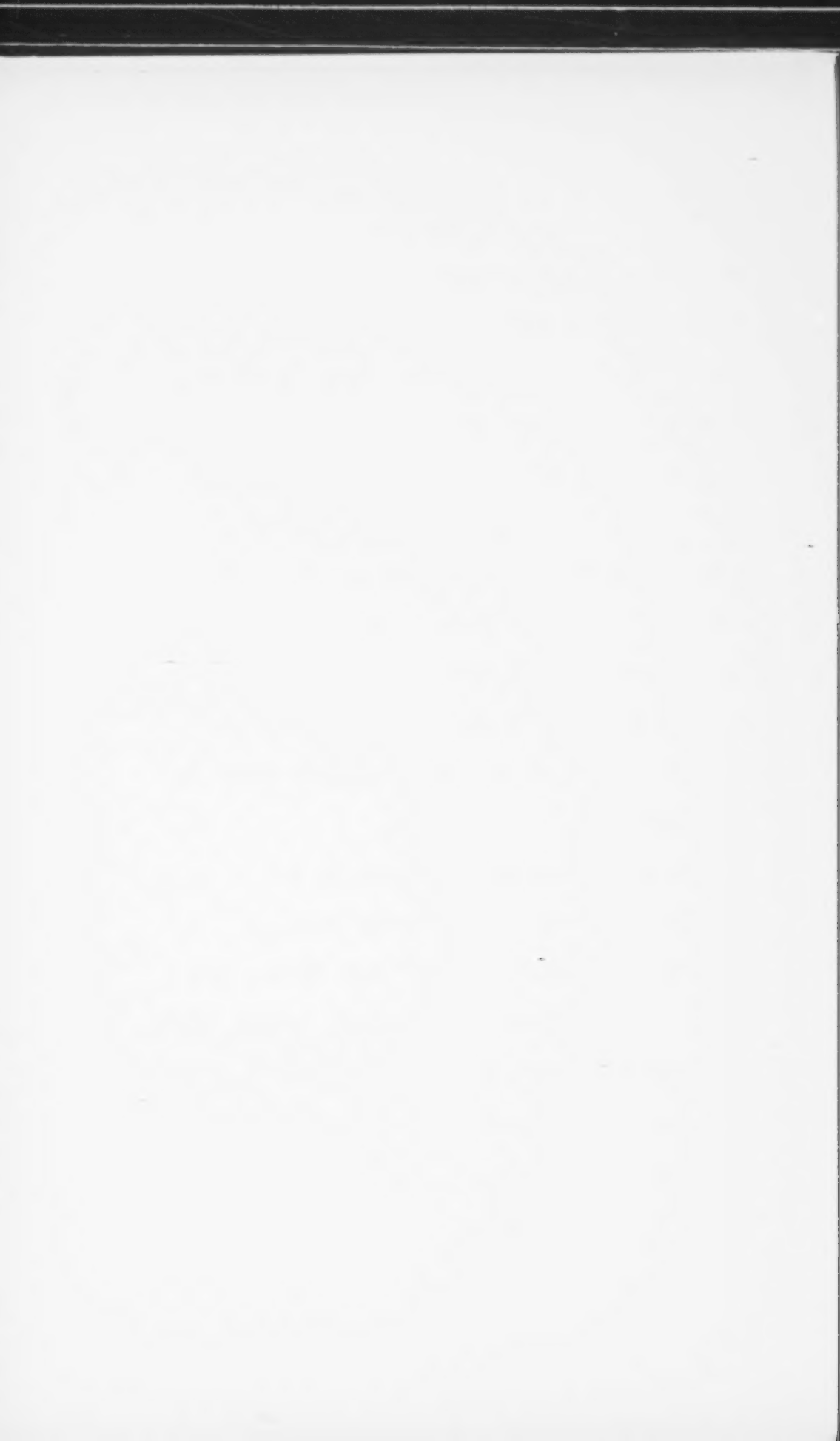
II.

CONCLUSION

The very essence and nature of the court system is to provide a forum for the resolution of disputes. The harshness of depriving any person, who feels he has a valid claim, his day in court should be avoided whenever possible.

The rules that pleadings should be amended whenever possible or a complaint held adequate if any cause of action is stated are designed to guarantee that the court will be the place to resolve disputes.

Words and phrases have different connotations to individuals with divergent backgrounds. The fact that a case can be reversed several times, from the Superior Court, until decided by the U.S. Supreme Court demonstrates this problem.



The fact that a litigant may not state a case in perfect form should not cause the litigant to lose on procedural grounds.

This case should be remanded to the Superior Court for trial or pleading amendment.

Respectfully submitted,

Melvin D. Phillips, In Properia Persona
(signed Melvin Phillips)

Melvin D. Phillips,
P.O. Box 1979,
Martinez, CA 94553,
March 9, 1988
California Attorney General,
John K. Vandekamp,
50 McAllister St.,
Room 6000,
San Francisco, CA 94102

Dear Mr. Vandekamp:

I am in the process of preparing a
petition for a Writ of Certiorari to the
United States Supreme Court.

The petition, if granted, may affect
California Law Code of Civil Procedure
1063a through 1110 inclusive.

This letter is being supplied, pursuant
to the U.S. Supreme Court Rules.

Very truly yours,

Melvin D. Phillips (signed Melvin
Phillips)

MDP/hdj

PROOF OF SERVICE

I declare that I am a resident of County of Contra Costa, California. I am over the age of eighteen (18) years and I am the petitioner in this action. My business address is 597 Center Avenue, Suite 355, Martinez, California 94553

On April 19, 1988, I served "Petition for Writ of Certiorari" on the parties listed below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Martinez, California, addressed as follows:

Respondant: Jeffrey A. Walter
Waterfall Towers
2455 Bennett Valley Road,
Suite 302B
Santa Rosa, CA 95404
(three copies of the petition)

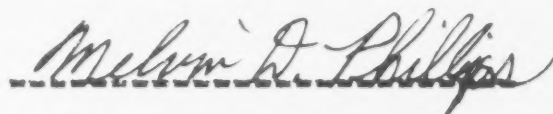
Superior Court: Judge David A. Dolgin
Court Clerk, J.R. Olsson
725 Court Street
P.O. Box 911
Martinez, CA 94553

Appellate Court: Justices H.W. Low,
D.B. King, Z.P. Haring
Case Number A036295
Court Clerk, Ron D. Barrow
350 McAllister Street
4th Floor
San Francisco, CA 94102

Supreme Court: Chief Justice, Malcolm Lucas
Case Number S002953
Court Clerk, Lawrence P. Gill
350 McAllister Street
4th Floor
San Francisco, CA 94102

California Attorney General:
John K. Vandekamp
350 McAllister Street
Room 6000
San Francisco, CA 94102

I declare under penalty of perjury that the
foregoing is true and correct, and that this
declaration was executed on April 15, 1988,
at Concord, California.



Melvin D. Phillips

State of California, County of Contra
Costa: On April 15, 1988, before me, the
undersigned, a Notary Public in and for



said County, personally appeared Melvin D. Phillips, known to me to be the person whose name is subscribed to the within instrument, proof of service, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

SEAL

William L. Hansen

